(21,163.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 157.

COLUMBIA HEIGHTS REALTY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND ET AL.

a Supreme Court of the District of Columbia.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Petition.*

Filed May 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for Said District.

In re EXTENSION OF ELEVENTH STREET NORTHWEST.

To the Supreme Court of the District of Columbia, sitting as a District Court:

The petition of John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress by act approved March 3, 1899, entitled "An Act to extend S Street, in the District of Columbia, and for other purposes," directed your petitioners to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof, as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence with the same width and in a straight line to

Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, under and according to
2 the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia.

2. That a map of the proposed extension of Eleventh street, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared, and a copy thereof is annexed as a part of this petition marked "Exhibit D. C. No. 1."

3. That said act provides, among other things, that of the amount found due and awarded as damages for and in respect of the land condemned for the extension of said Eleventh street at least one-half thereof shall be assessed by said jury against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended.

Wherefore your petitioners pray this Honorable Court to direct the Marshal of the District of Columbia to summon a jury of seven judicious disinterested men, not related to any party interested, to be and appear on the premises, on a day specified, to assess the damages, if any, which each owner of land through which Eleventh street is proposed to be extended, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made, and proceedings had, as are contemplated by said Act of Congress, and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a per-
3 manent right of way for the public over said lands may be obtained and secured for the aforesaid extension of Eleventh street, and they will every pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

E. H. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

(Here follows Exhibit "D. C. No. 1," map, marked p. 4.)

5 *Instructions to Jury by Justice Hagner.*

Filed January 10, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

The jury are instructed that in estimating the damage done to the owner of land through which said Eleventh street will pass by

reason of the extension and opening of same they are not confined to the value of the land covered or actually taken by such street, but should allow such owner a reasonable amount for the direct damage done to the remaining part of such piece or parcel of land.

Therefore, if they find, by reason of the extension and opening of said Eleventh street, it will be necessary to make deep cuts through such property, leaving the adjoining parts of the same land high above the contemplated grade of said street, which in their opinion will be of great damage and injury to such adjoining land or to any buildings thereon, unless sufficiently protected, then in estimating the damages to be awarded they should take into consideration the condition in which the remaining part of the land is left by reason of the extension and opening of said street,
6 and also the cost of protecting such part of the land adjoining such cut and the buildings thereon, if any, and make allowance accordingly.

The above instruction is given.

A. B. HAGNER.

10 July, 1900.

Commissioners except.

Filed January 10, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

The jury are further instructed by the court—

That in estimating the value of land taken for the extension of Eleventh street, the jury are to make no allowance for damages which may result from any change of the grade when the street may hereafter be actually opened by the authorities.

Refused.

The Commissioners except.

7 *Verdict.*

Filed February 20th, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

We, the jury in the above entitled cause, hereby find the following verdict and award of damages, for and in respect of the land condemned and taken necessary for the extension of Eleventh Street, Northwest, on a straight extension of the lines thereof, as now established in the City of Washington, with a width of ninety (90)

feet, from Florida Avenue to Harvard Street, and thence with the same width and in a straight line to Lydecker Avenue, joining said avenue with its center line opposite the center line of Eslin Avenue, as shown on the plat or map filed with the petition herewith, as set forth in Schedule 1, hereto annexed, as part hereof. And we, the jury aforesaid, in accordance with the Act of Congress approved March 3, 1899, for the extension of said street, do hereby assess the sum of $134560.00, being one-half of the damages so as aforesaid awarded in Schedule 1, against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred (200) feet from the
8 building lines of said Eleventh Street, as extended, which we find will be benefited by the extension of said Eleventh Street, as set forth in Schedule 2, hereto annexed, as part hereof.

Witness our hands and seals this 16th day of February, A. D. 1900.

NOBLE D. LARNER. [SEAL.]
E. S. PARKER. [SEAL.]
CHAS. B. BAILEY. [SEAL.]
GEORGE W. MOSS. [SEAL.]
A. D. HAZEN. [SEAL.]
ROB'T W. FLEMING. [SEAL.]
HENRY F. BLOUNT. [SEAL.]

SCHEDULE No. 1.

Award of Damages for the Extension of Eleventh Street N. W.

Description of piece or parcel of land taken.	Area taken (sq. ft.).	Award of damages.
* * * * *	*	*
Part of lot 1, Block 27 of Columbia Heights Subdivision, included within the lines of eleventh street extended, as shown by map annexed to petition in this cause	9,543.45	$5,726.00
Grade damages	.....	2,500,00
9		
Part of lot 30, Block 27 of Columbia Heights subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause	8,382.60	$5,030.00
Grade damages	.....	1,469.00
Part of lot 1, Block 28 of Columbia Heights subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause	15,657.50	$10,960.00
Grade damage	.....	6,300.00
Part of lot 16, Block 28 of Columbia Heights subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause	13,957.40	$8,374.00
Grade damage	.....	6,300.00
* * * * *	*	*

10 SCHEDULE No. 2.

Assessment of Benefits for the Extension of 11th Street N. W.

Description of pieces or parcels of land assessed.	Name of owner.	Amount of benefits assessed.
West 36.6 feet by its depth of lot 1, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$1,517.00
Lot 2, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$2,130.00
Lot 3, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$1,811.00
Lot 4, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$1,811.00
East 14.4 feet, by its depth of lot 5, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$521.00
East 14.4 feet, by its depth of lot 26, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$521.00
Lot 27, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$1,810.00
Lot 28, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$1,810.00
Lot 29, Block 27, Columbia Heights subdivision.	John Sherman & A. M. Hoyt.	$2,130.00

11 SCHEDULE No. 2.

Assessment of Benefits for the Extension of 11th Street N. W.

Description of pieces or parcels of land assessed.	Name of owner.	Amount of benefits assessed.
West 35.6 feet by its depth of lot 30, Block 27, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$1,517.00
West 85.6 feet by its depth of lot 1, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$4,687.00
Lot 2, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$4,769.00
East 14.4 feet by its depth of lot 3, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$697.00
East 14.4 feet by its depth of lot 14, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$657.00
Lot 15, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$4,559.00
West 85.6 feet by its depth of lot 16, Block 28, Columbia Heights Subdivision.	John Sherman & A. M. Hoyt.	$4,591.00

* * * * * * *

Objections to Confirmation of Assessments for Benefits.

Filed June 28, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

12 Now come John Sherman and A. M. Hoyt, by their Attorney Leo Simmons, Esq., owners of certain land in blocks 27 and 28, of a subdivision now known as Columbia Heights, which has been assessed by the jury in the above entitled cause, for certain alleged benefits, and object to the confirmation of such assessments upon the ground that same were made without lawful authority under and by virtue of a statute, the section of which requiring such assessment, is and has been declared unconstitutional and void. Upon the further grounds that said assessments were made without regard to benefits under and by virtue of an erroneous instruction of the court; and such assessments far exceed the benefits received, and are therefore, illegal and void.

LEO SIMMONS,
Att'y for Sherman and Hoyt.

* * * * * * *

Decree.

Filed July 3, 1900.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court.

This cause came on to be heard on the motion of the petitioners herein, the Commissioners of the District of Columbia filed
13 under the Act of Congress approved June 6, 1900, to confirm the verdict, award and assessment of the jury heretofore filed herein and to overrule the exceptions filed by the several owners of real estate who are assessed for benefits in and by said verdict of said jury; and the said motion was argued by counsel for the respective parties; and it appearing to the Court that the order *nisi*, confirming said verdict, award and assessment of said jury has been duly published as therein provided, and that the owners of the property taken for the extension of said street, and the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding, and of the said assessment, as provided by the order of the Court heretofore passed herein,—

It is this 3d day of July, A. D. 1900, by the Court Adjudged, Ordered and Decreed that the several awards of the said jury for and in respect of the land condemned for the extension of said Eleventh street be, and the same are hereby finally ratified and confirmed; and that the land necessary for the extension of Eleventh Street northwest on a straight extension of the lines thereof, as now established in the City of Washington, with a width of ninety feet, from Florida Avenue to Harvard street and thence with the same width and in a straight line to Lydecker Avenue, joining said Avenue with its center line opposite the center line of Eslin Avenue and in this proceeding described and shown on the plat filed herein, be, and the same is hereby condemned; and payment of the several sums of
14 money in said verdict found to be due and payable for the lands aforesaid shall be made in accordance with the Act of Congress, approved March 3, 1899, and the amendment thereof approved June 6, 1900, pursuant to which, proceedings in this cause have been had.

And it is further adjudged, ordered and decreed that the several assessments for benefits made, returned and levied by the jury in its aforesaid award filed in this cause, be, and they are hereby declared illegal, null and void, and the same are hereby set aside and vacated; and from so much of this order as declares said assessments to be illegal, null and void, the petitioners, in open Court pray an appeal to the Court of Appeals which is hereby allowed.

E. F. BINGHAM, *C. J.*

Mandate.

Filed July 22, 1903.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of
15 Columbia, before you or some of you, in a cause entitled *In re* Extension of Eleventh Street northwest, No. 556, District Court, wherein the order of the said Supreme Court entered in said cause on the 3d day of July, A. D. 1900, is in the following words, viz.:

"*In re* THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

This cause came on to be heard on the motion of the petitioners herein, The Commissioners of the District of Columbia, filed under the Act of Congress approved June 6, 1900, to confirm the verdict, award, and assessment of the jury heretofore filed herein, and to overrule the exceptions filed by the several owners of real estate who

are assessed for benefits in and by said verdict of said jury; and the said motion was argued by counsel for the respective parties, and it appearing to the court that the order *nisi,* confirming said verdict, award, and assessment of said jury, has been duly published as therein provided, and that the owners of the property taken for the extension of said street and the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of the said assessments, as provided by the order of the court heretofore passed herein—

16 It is, this 3d day of July, A. D. 1900, by the court adjudged, ordered, and decreed that the several awards of the said jury for and in respect of the land condemned for the extension of said Eleventh street be, and the same are hereby, finally ratified and confirmed, and that the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, and in this proceeding described and shown on the plat filed herein, be, and the same is hereby condemned; and payment of the several sums of money in said verdict found to be due and payable for the lands aforesaid shall be made in accordance with the act of Congress approved March 3, 1899, and the amendment thereof approved June 6, 1900, pursuant to which proceedings in this cause have been had.

And it is further adjudged, ordered and decreed that the several assessments for benefits made, returned, and levied by the jury in its aforesaid award filed in this cause be, and they are hereby, declared illegal, null, and void, and the same are hereby set

17 aside, and vacated; and from so much of this order as declares said assessments to be illegal, null and void the petitioners in open Court pray an appeal to the Court of Appeals, which is hereby allowed.

E. F. BINGHAM, *C. J.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, taken by John B. Wight, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, whereon Eugene Byrnes, *et al.,* were made the parties appellees, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas at the April Term, A. D. 1901, of said Court of Appeals, the death of John Sherman, one of the appellees, having been suggested, it was, at the January Term, A. D. 1902 of said Court of Appeals, ordered that Myron M. Parker, and Winfield S. Kerr, Executors of the said John Sherman, deceased, be made parties appellees herein.

And whereas at the April Term, A. D. 1901, of said Court of

Appeals, the retirement of John B. Wight and the appointment of Henry B. F. Macfarland as his successor as Commissioner of the District of Columbia having been suggested, it was ordered that the said Henry B. Macfarland, as such Commissioner, be made a party appellant herein.

And whereas at the October Term, A. D. 1901, of said Court of Appeals, the retirement of Lansing H. Beach, and the appointment of John Biddle as his successor as Commissioner of the Dis-
18 trict of Columbia, having been suggested, it was ordered that the said John Biddle, as such Commissioner, be made a party appellant herein.

And whereas, in the term of April, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered adjudged and decreed by this Court that the order of the said Supreme Court in this cause appealed from, and only so far as appealed from, be, and the same is hereby, reversed; and it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to vacate such part of the said order, and for such further proceedings in the case according to law as may be just and right.

April 1, 1902.

And whereas said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, agreeably to the Act of Congress in such case made and provided;

And whereas at the October Term, 1902, of said Supreme Court of the United States the following decree was entered, viz:

"It is now here ordered, adjudged and decreed by this Court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

December 1, 1902."

19 as by the inspection of the mandate of said Supreme Court of the United States fully and at large appears.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 22d day of July in the year of our Lord one thousand nine hundred and three.

ROBERT WILLETT,
Clerk of the Court of Appeals
of the District of Columbia.

Order Vacating Decree so far as it Vacates Assessment.

Filed March 4, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556.

Upon consideration of the mandate of the Court of Appeals filed in this case, it is this 4th day of March, 1904, ordered that the decree in this case, vacating said assessment and only so far as it vacates said assessment, be and the same is hereby set aside and
20 vacated, in accordance with said mandate. And the case being further heard on motion of the petitioners for confirmation of the assessment for benefits according to the verdict of the jury of seven, and after argument by counsel for the parties, and due consideration of the exceptions of the respondents, from which it appears to the Court that they and each of them are dissatisfied with said verdict, it is therefore ordered that said motion to confirm be and the same is hereby, in all respects, overruled; and it is further ordered, in case the petitioners desire to proceed further in the premises, that they shall within a reasonable time make application to this court for directing the United States Marshal to summon a jury of twelve as provided by law. To which order petitioners except and pray, and appeal in open Court.

ASHLEY M. GOULD, *Justice.*

Motion of Abner Greenleaf and Others to Dismiss, &c.

Filed June 17th, 1904.

(As Appears on District Docket.)

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556.

Now come Abner Greenleaf and other property owners, representative of record by Leo Simmons, and Samuel Maddox and move the Court to dismiss this suit, as to any further proceedings
21 in this cause, because the law under which such proceeding must be had, has been repealed. Second, for failure of the petitioners to proceed as required by the order of this Court, passed in the cause on March 4, 1904.

LEO SIMMONS AND
SAM'L MADDOX,
Att'ys for said Owners.

Messrs. Duvall & Sinclair, Att'ys for Petition-s:

Take notice, we will call up the above motion before Mr. Justice Gould, holding a District Court on Tuesday the 7th day of June, 1904, at ten o'clock A. M. or as soon thereafter as counsel can be heard.

LEO SIMMONS AND
SAM'L MADDOX, *Att'ys.*

Service accepted.
6/2/04.
A. B. DUVALL,
Per G.

Order Directing Petitioners to Re-assess Benefits, &c.

Filed June 17, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556.

Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th A. D.
22 1904, it is by the Court, this 17th day of June, A. D. 1904, ordered, That the petitioners in the above-entitled cause, within sixty days from the date hereof proceed in the matter of the re-assessment of benefits herein, in accordance with the terms and provisions of the Act of Congress approved June 6, 1900, entitled "An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes."

By the Court:

ASHLEY M. GOULD, *Justice.*

Amended and Supplemental Petition of Commissioners, D. C.

Filed August 9, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court.

The petition of Henry B. F. Macfarland, Henry L. West, and Chester Harding, (acting) Commissioners of the District of Columbia, respectfully represents:

1. That heretofore, to wit, on the 31st day of May, 1889, the then Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved March 3, 1899, filed a pe-

tition herein praying the condemnation of certain land necessary for the extension of Eleventh Street, Northwest, on a straight
23 extension of the lines thereof, with a width of ninety feet, from Florida Avenue to Harvard Street, and thence, with the same width and in a straight line, to Lydecker Avenue, joining said Avenue with its center line opposite the center line of Eslin Avenue, under and according to the provisions of Chapter XI of the Revised Statutes of the United States relating to the District of Columbia.

2. That thereafter, on the 10th day of November, 1899, this Honorable Court directed the United States Marshal for the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested in the proceeding, to be and appear upon the premises described in said petition on a day specified, to assess the damages, if any, which each owner of land might sustain by reason of the extension of said Eleventh Street, as aforesaid, and to assess at least one-half of the amount found due and awarded as damages by said jury in respect of the land condemned for said extension, against those pieces or parcels of ground abutting that portion of the street to be opened and extended to a depth of two hundred feet from the building lines of said Eleventh Street as extended; and to further proceed in accordance with the provisions of the aforesaid Act of Congress approved March 3, 1899.

3. That thereafter a jury of seven persons was impaneled, received instructions from the Court as to its duties, proceeded to assess the damages and benefits, and on the 16th day of February, 1900, filed its verdict and award herein.

24 4. That on March 19, 1900, an order of ratification *nisi* of said verdict and award was passed, and on July 3, 1900, the Court passed an order herein finally ratifying and confirming the several awards of said jury for and in respect of the land condemned for the extension of Eleventh Street as aforesaid, but vacated the assessments for benefits made by the jury and declared them illegal, null and void.

5. That thereafter, on appeal to the Court of Appeals of the District of Columbia, the said order of the Court passed herein was reversed in so far as it vacated the said assessments for benefits.

6. That on the 4th day of March, 1904, that portion of the aforesaid order which vacated said assessments for benefits, was set aside by the Court, in accordance with the mandate of the Court of Appeals and the case being further heard, upon motion of the petitioners to ratify and confirm the assessments for benefits made by the jury, the Court, upon consideration of certain exceptions filed in the case (from which it appeared that the exceptants were dissatisfied with the verdict of the jury), passed an order overruling the motion to ratify and confirm said assessments for benefits.

7. That Section 12 of the Act of Congress approved June 6, 1900, entitled "An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes," provides, amongst other things, that:—

25 "In the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason

be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a re-assessment of such benefits under and in accordance with the provisions of this Act."

8. That on the 17th day of June, 1904, the Court passed an order herein directing the petitioners, within sixty days from said date, to proceed in the matter of the re-assessment of benefits herein, in accordance with the terms and provisions of the said Act of Congress approved June 6, 1900.

The premises considered, your petitioners pray:

First. That this Honorable Court may cause public notice of not less than ten days to be given of the filing of this, the amended and supplemental petition of the Commissioners of the District of Columbia, by advertisement in such manner as the Court shall prescribe, warning all persons having any interest in the proceedings to attend Court on a day to be named in said notice and to continue in attendance until the Court shall have made its final order ratifying and confirming the re-assessments of benefits of the jury herein.

Second. That the United States Marshal for the District of Columbia may be directed to summon seven judicious, disinterested men not related to any person interested in this proceeding
26 and not in the service or employ of the District of Columbia or of the United States, to re-assess such amount of the amount heretofore found to be due and awarded as damages for and in respect of the land condemned for the extension of Eleventh street, as aforesaid, as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Eleventh street, as extended, and also on any and all pieces or parcels of land which have been benefited by the extension of said Eleventh street, as aforesaid, as said jury may find said pieces or parcels of land have been benefited by the extension of Eleventh street, northwest, in accordance with the provisions of the aforesaid Act of Congress approved June 6, 1900.

And that such other and further orders may be passed, and such other proceedings may be had herein, as are contemplated by said Acts of Congress approved March 3, 1899, and June 6, 1900.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
CHESTER HARDING,
Acting Commissioners, D. C., and Petitioners Herein.

A. B. DUVALL,
A. LEFTWICH SINCLAIR,
Attorneys for Petitioners.

27 DISTRICT OF COLUMBIA, *ss:*

Personally appears Henry B. F. Macfarland, who upon oath says, that he is President of the Board of Commissioners of the District of Columbia, whose foregoing petition he has read, and that the facts therein stated are true to the best of his knowledge and belief.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me this 5th day of August, A. D. 1904.

WILLIAM TINDALL.
[SEAL.] *Notary Public, D. C.*

(Endorsed:) Let this amended petition be filed. Job Barnard, Justice.

Order Warning Persons Interested to Appear.

Filed October 27, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court Docket.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to an order passed herein on the 17th
28 day of June, 1904, and the provisions of an Act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia Road east of Thirteenth street and for other purposes," have filed an amended and supplemental petition herein, praying that a jury of seven (7) judicious, disinterested men, not related to any person interested in this proceeding and not in the service or employ of the District of Columbia or of the United States, be summoned by the United States Marshal for the District of Columbia, to re-assess such amount of the amount heretofore found to be due and awarded as damages for and in respect of the land condemned for an extension of Eleventh street, northwest, on a straight extension of the lines thereof, with a width of ninety (90) feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin Avenue, as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Eleventh street as extended, and also on any and all pieces or parcels of land which have been benefited by the extension of said Eleventh street, as aforesaid, as said jury may find said pieces or parcels of land have been benefited, in accordance with the provisions of the aforesaid Act of Congress. It is, by the Court, this 27th day of October, A. D. 1904, *ordered:* That all persons having any interest in this proceeding be, and they are hereby, warned and required to appear in this court on or before the 28th
29 day of November, A. D. 1904, and to continue in attendance until the court shall have made its final order ratifying and confirming the reassessment of benefits of the jury to be impaneled herein. It is further ordered, That this notice and order be published once in The Washington Law Reporter, and on six secular days in The Evening Star, The Washington Post and The Wash-

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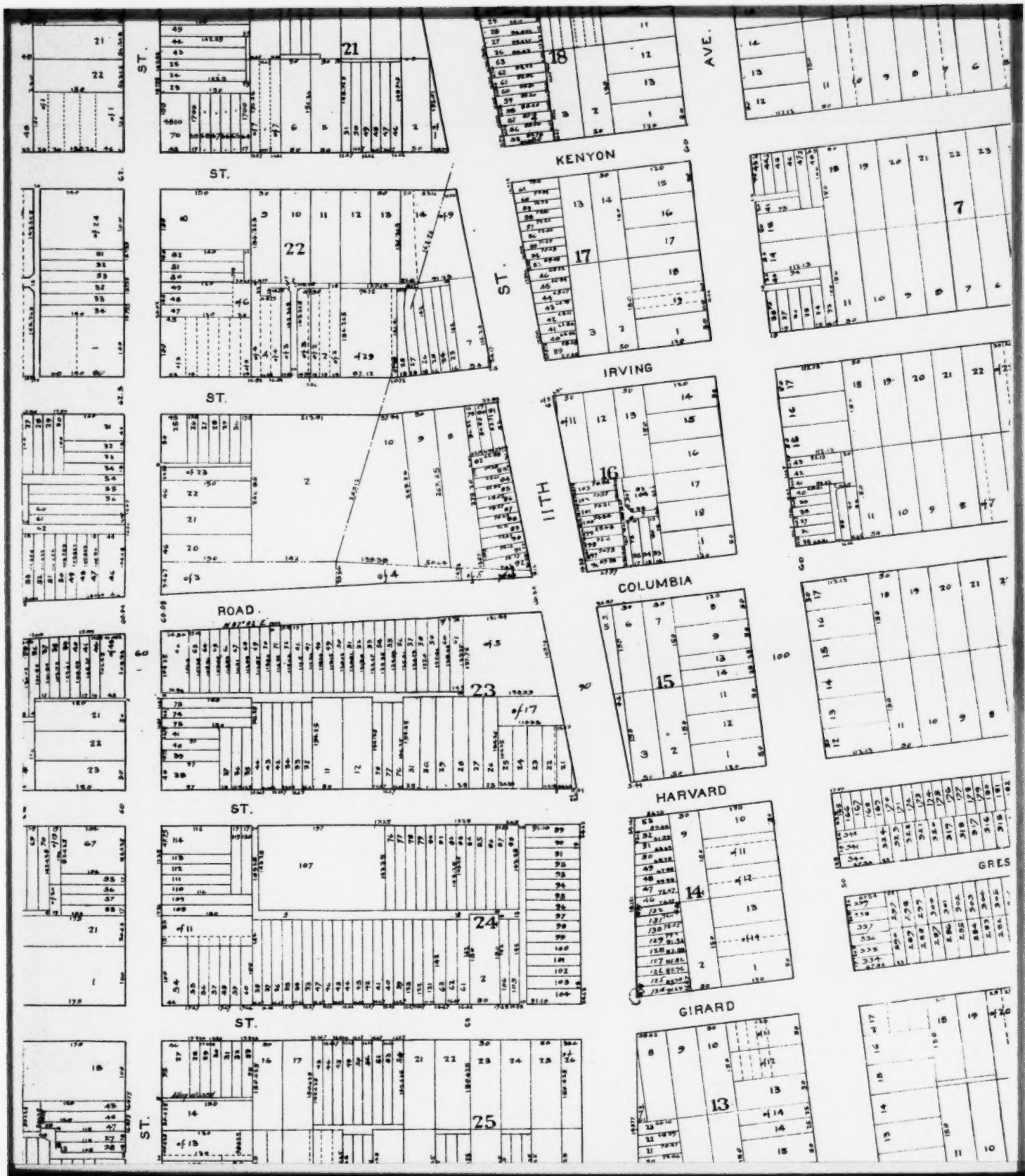
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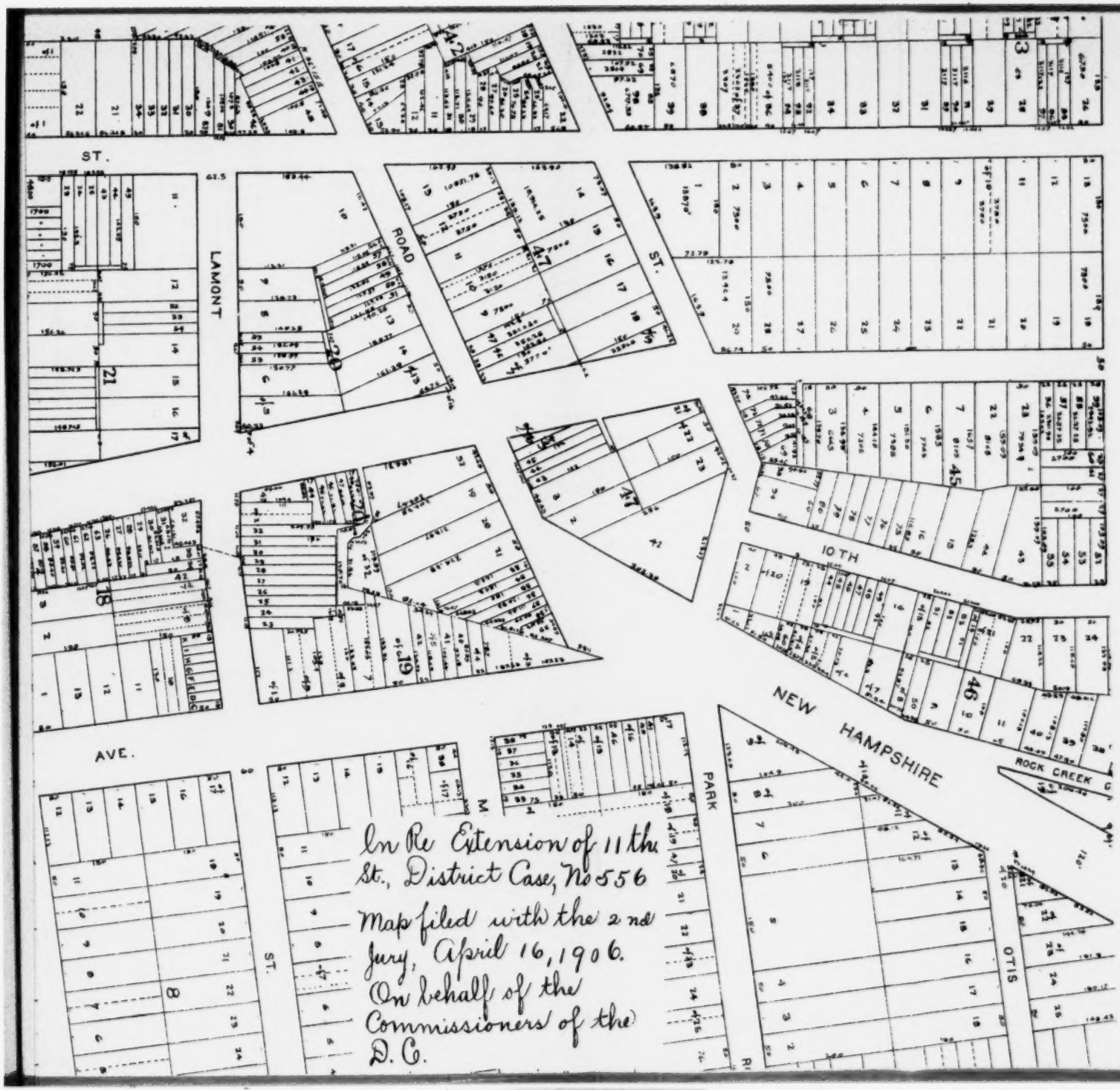
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PARK
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ROCK CREEK
In Re Extension of 11th St., District Case, No 556
Map filed with the 2nd Jury, April 16, 1906.
On behalf of the Commissioners of the D. C.

ington Times, newspapers published in said District, before the 28th day of November, A. D. 1904.

By the court:

ASHLEY M. GOULD, *Justice.*

30 *Memoranda.*

February 9, 1906.—Proof of publication in the Washington Times of order of October 27th, 1904, Warning Persons interested to Appear.

February 9, 1906.—Proof of publication in The Evening Star of order of October 27th, 1904, Warning Persons interested to Appear.

February 9, 1906.—Proof of publication in The Washington Post of order of October 27th, 1904, Warning Persons interested to Appear.

February 9, 1906.—Proof of publication in The Washington Law Reporter of order of October 27th, 1904, Warning Persons interested to Appear.

(Here follows map marked p. 31.)

32 *Verdict of Jury.*

Filed June 6, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. No. 556, District Court.

We, the undersigned, heretofore summoned, accepted and sworn herein as a jury to assess the benefits which have accrued to property by reason of the extension of Eleventh street, northwest, on a straight extension of the lines thereof, with a width of ninety feet from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin Avenue, in the District of Columbia, in accordance with the provisions of an Act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia road east of Thirteenth street, and for other purposes," respectfully certify and show to the Court:—

That after being sworn by the Court for the proper performance of our duties, we personally viewed and examined the land in the neighborhood of the said extension, with great care, and thereafter, at the United States Court House in the City of Washington, in said District, on the 28th day of March, A. D. 1906, at 2 o'clock
33 P. M., and from time to time thereafter, pursuant to adjournment, after due notice to the persons interested herein,

we met and heard and received such evidence as was offered or submitted to us on behalf of the District of Columbia and by the persons interested, touching the benefits which have accrued to property by reason of the extension of said Eleventh Street, as aforesaid, and upon our personal view and examination aforesaid, and the evidence aforesaid, we find that the lots, pieces or parcels of land which have been benefited by the aforesaid extension of said Eleventh street are the lots, pieces or parcels of land mentioned, set forth and described in the following schedule; and we, the jury aforesaid, find that the several lots, pieces or parcels of land mentioned and set forth in said schedule have been benefited to the extent of the respective amounts mentioned and set forth in said schedule, and we hereby assess against the said lots, pieces or parcels of land, respectively, as and for benefits, as aforesaid, the several amounts mentioned, specified and set forth in said schedule.

Witness our hands and seals this 6 day of June A. D. 1906.

JOHN E. HERRELL. [SEAL.]
DANIEL FRASER. [SEAL.]
W. V. COX. [SEAL.]
JAS. F. OYSTER. [SEAL.]
JOHN H. NOLAN. [SEAL.]
W. A. H. CHURCH. [SEAL.]
EDWARD GRAVES. [SEAL.]

34

SCHEDULE.

Assessments for Benefits.

Against lots in Columbia Heights, recorded in Surveyor's Office, Book Governor Shepherd, p. 158, as follows:

Against all that part of lot 1, Block 28, not condemned for the extension of Eleventh Street, Columbia Heights Realty Company, owner, amount assessed as benefits..... $4000
Against all of lot 2, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000
Against all of lot 14, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000
Against all of lot 15, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $2000
Against all that part of lot 16, Block 28, not condemned for the extension of Eleventh Street, Columbia Heights Realty Company, owner, amount assessed as benefits..... $5000
Against all that part of lot 1, Block 27, not condemned for the extension of Eleventh street, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1500
Against all of lot 2, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1500
Against all of lot 3, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000
Against all of lot 4, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000

Against all of lot 5, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $600

Against all of lot 6, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $400

Against all of lot 25, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $400

Against all of lot 26, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $600

Against all of lot 27, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000

Against all of lot 28, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000

35 Against all of lot 29, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits $1500

Against all that part of lot 30, Block 27, not condemned for the extension of Eleventh street, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1500

Against all that part of lot 1, Block 26, not condemned for the extension of Eleventh street, Cora Behrend, owner, amount assessed as benefits..... $750

Against all of lot 2, Block 26, Cora Behrend, owner, amount assessed as benefits..... $750

Against all of lot 20, Block 26, M. Greif, *et al.*, owner, amount assessed as benefits..... $20

Against all of lot 21, Block 26, M. Greif, *et al.*, owner, amount assessed as benefits..... $30

Against all of lot 22, Block 26, Cora Behrend, owner, amount assessed as benefits..... $200

Against the west 16.67 feet front by full depth of lot 23, Block 26, J. Kinnan, owner, amount assessed as benefits. $100

Against the part of lot 23, Block 26, beginning 16.67 feet from northeast corner of said lot; thence south by full depth of said lot; thence west 16.67 feet; thence north to north line of said lot and thence 16.67 feet to the beginning, J. Kinnan, owner, amount assessed as benefits.... $125

Against the east 16.67 feet front by full depth of lot 23, Block 26, Chas. Garrels, owner, amount assessed as benefits $175

Against all of lot 24, Block 26, A. D. Prince, owner, amount assessed as benefits..... $750

Against all that part of lot 25, Block 26, not condemned for the extension of Eleventh street, Max Luchs, owner, amount assessed as benefits..... $750

Against the re-subdivision of lots 3 to 6, Block 26, Columbia Heights, now recorded as lots 28 to 37 in County Book 13, p. 104, and County Book 16, p. 69, Surveyor's Office, D. C., as follows:

Against all of lot 28, N. D. Bronson, owner, amount assessed as benefits $250

Against all of lot 29, Eugene G. Jefferys, owner, amount assessed as benefits $150
Against all of lot 30, M. S. Logan, owner, amount assessed as benefits $100
Against all of lot 31, M. S. Logan, owner, amount assessed as benefits $50
Against all of lot 32, Eugene G. Jefferys, owner, amount assessed as benefits $25
Against the west 245 feet front by full depth of lot 33, S. B. Miller, owner, amount assessed as benefits $15
Against all of lot 34, I. O. Herriott, owner, amount assessed as benefits $10
Against all of lot 35, H. K. Collins, owner, amount assessed as benefits $5
36 Against all of lot 26, E. Potbury, owner, amount assessed as benefits $5
Against all of lot 37, E. G. Jefferys, owner, amount assessed as benefits $3

Against lots in Block 25, Columbia Heights, recorded in Book Governor Shepherd, Surveyor's Office, D. C., p. 137, as follows:

Against all that part of lot 1, Block 25, not condemned for the extension of Eleventh street, L. E. Morris, owner, amount assessed as benefits $800
Against all of lot 2, Block 25, S. C. Lovejoy and L. J. Hills, owners, amount assessed as benefits $750
Against all of lot 6, Block 25, P. and W. Pulsifer, owners, amount assessed as benefits $20
Against all of lot 21, Block 25, E. Pifferling, owner, amount assessed as benefits $15
Against all of lot 22, Block 25, C. H. Wiltsie, owner, amount assessed as benefits $75
Against all of lot 23, Block 25, M. C. Spelhouse, owner, amount assessed as benefits $150
Against all of lot 24, Block 25, I. W. Nordlinger, owner, amount assessed as benefits $350
Against all of lot 25, Block 25, L. A. Samstag, owner, amount assessed as benefits $700
Against all that part of lot 26, Block 25, not condemned for the extension of Eleventh street, M. A. Wadhams, owner, amount assessed as benefits $800

Against the re-subdivision of lots 3, Block 25, Columbia Heights, now recorded as lots 34, 35 and 36, in County Book 11, p. 102, Surveyor's Office, D. C., as follows:

Against lot 34, A. M. Stewart, owner, amount assessed as benefits $200
Against lot 35, L. H. Stabler, owner, amount assessed as benefits $125
Against lot 36, H. I. Russell, owner, amount assessed as benefits $75

Against the re-subdivision of lot 4, Block 25, Columbia Heights, now recorded as lots 46, 47, 48 in County Book 14, p. 91, Surveyor's Office, D. C. as follows:

Against lot 46, E. G. Jefferys, owner, amount assessed as benefits $75
Against lot 47, E. G. Jefferys, owner, amount assessed as benefits $65
Against lot 48, A. W. Jenks, owner, amount assessed as benefits $60

Against the re-subdivision of lot 5, Block 25, Columbia Heights, now recorded as lots 40, 41 and 42 in County Book 12, p. 126, Surveyor's Office, D. C., as follows:

37 Against lot 40, A. E. Johnson and E. D. Hackett, owners, amount assessed as benefits..... $50
Against lot 41, M. F. Cowell, owner, amount assessed as benefits $30
Against lot 42, S. E. Henry, owner, amount assessed as benefits $20

Against all of lot 2, Block 24, Columbia Heights as by record in County Book 6, p. 46, Surveyor's Office, D. C., John B. Lybrook, owner, amount assessed as benefits..... $150

Against the resubdivision of lots 3 and 4, Block 24, Columbia Heights, now recorded as lots 61, 62, 63, and 121, 122 and 123, in County Book 16, p. 156 and County Book 19, p. 66, Surveyor's Office, D. C., as follows:

Against lot 61, W. B. Harley, owner, amount assessed as benefits $25
Against lot 62, C. Platz, owner, amount assessed as benefits.. $25
Against lot 63, E. Wagner, owner, amount assessed as benefits $25
Against lot 121, A. F. Mead, owner, amount assessed as benefits $5
Against lot 122, S. L. Corby, owner, amount assessed as benefits $5
Against lot 123, R. L. O'Brien, owner, amount assessed as benefits $3

Against the re-subdivision of certain lots in Block 24, Columbia Heights, now recorded as lots 78 to 106, in County Book 17, p. 29, Surveyor's Office, D. C., as follows:

Against lot 78, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $3
Against lot 79, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $5
Against lot 80, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $5

Against lot 81, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $20
Against lot 82, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $20
Against lot 83, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $20
Against lot 84, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $40
Against lot 85, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $40
Against lot 86, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $40
38 Against lot 87, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $80
Against lot 88, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $80
Against lot 89, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $500
Against lot 90, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 91, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 92, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 93, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 94, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 95, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 96, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 97, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 98, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 99, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 100, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 101, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 102, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 103, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $300
Against lot 104, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $500
Against lot 105, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $100
Against lot 106, M. M. Parker and Pitman Pulsifer, Trustees, amount assessed as benefits..... $100

Against all that part of lot 5, Block 23, Columbia Heights as by record in County Book 6, p. 46, Surveyor's Office, D. C., and described as follows:
Beginning at the southwest corner of said lot 5; thence east 158.89 feet to Eleventh street; thence northwest along the west line of Eleventh street 149.10 feet to Columbia Road; thence southwest 131.94 feet to the west line of said lot 5 at a point 137.75 feet from the beginning; thence to point of beginning, Leo Simmons, owner, amount assessed as benefits $2000

39 Against all that part of lot 17, Block 23, Columbia Heights, County Book 6, p. 46, Surveyor's Office, D. C., not included in the condemnation of Eleventh street extended, E. D. Berry, owner, amount assessed as benefits $500

Against the re-subdivision of certain lots in Block 23, Columbia Heights now recorded as lots 21 to 30 in County Book 7, p. 135, Surveyor's Office, D. C., as follows:

Against lot 21, west of 11th Street and east 2 feet front by full depth of lot 22, G. L. Jenkins, owner, amount assessed as benefits..... $300
Against west 22.28 feet front by full depth of lot 22, E. E. Jordan, owner, amount assessed as benefits..... $250
Against lot 23, F. C. Smith, owner, amount assessed as benefits $200
Against lot 24, E. D. McCleery, owner, amount assessed as benefits $150
Against lot 25, G. W. Cox, owner, amount assessed as benefits $100
Against lot 26, J. E. and A. P. Sparks, owners, amount assessed as benefits..... $50
Against lot 27, C. A. Junken, owner, amount assessed as benefits $40
Against lot 28, P. E. Sharpless, owner, amount assessed as benefits $30
Against lot 29, John Waldman, owner, amount assessed as benefits $20
Against lot 30, C. R. Truesdell, owner, amount assessed as benefits $10
Against lot 31, J. M. and A. F. Grossman, owners, amount assessed as benefits..... $5

Against certain lots in Block 23, Columbia Heights subdivided as lots 58 to 61, etc., in County Book 14, p. 81, Surveyor's Office, D. C., as follows:

Against lot 58, L. M. Ferguson, owner, amount assessed as benefits $10
Against lot 59, C. S. Abbey, owner, amount assessed as benefits ..... $25.

Against lot 60, T. F. and A. K. Keane, owners, amount assessed as benefits $50

Against lot 61, F. S. Austin, owner, amount assessed as benefits $75

Against parts of lots 4 and 5, Block 23, Columbia Heights, as follows: Beginning at the northwest corner of said lot 4 as shown in County Book 6, p. 46, Surveyor's Office, D. C., thence south 39.54 feet to Columbia Road; thence N. 87° 02′ E., to the west line of Eleventh Street; thence northwest along Eleventh Street 9.16 feet; thence to place of beginning, J. W. Morris; owner, amount assessed as benefits $2000

40 Against lots 8, 9 and 10 of Block 16, Mt. Pleasant, Todd *et al.*, as recorded in Book Levy Court No. 2, p. 24, as follows:

Against lot 8, T. B. Sanders, owner, amount assessed as benefits $300

Against lot 9 Wm. M. Stuart, owner, amount assessed as benefits $200

Against lot 10, J. W. Morris, owner, amount assessed as benefits $100

Against certain lots in Block 16, Todd and Brown Sub., subdivided as lots 79 to 92 in County Book 20, p. 106, Surveyor's Office, D. C., as follows:

Against lot 79, Harry Wardman, owner, amount assessed as benefits $150

Against lot 80, Harry Wardman owner, amount assessed as benefits $200

Against lot 81, Harry Wardman, owner, amount assessed as benefits $300

Against lot 82, Harry Wardman, owner, amount assessed as benefits $200

Against lot 83, Harry Wardman, owner, amount assessed as benefits $200

Against lot 84, Harry Wardman, owner, amount assessed as benefits $200

Against lot 85, Harry Wardman, owner, amount assessed as benefits $200

Against lot 86, Harry Wardman, owner, amount assessed as benefits $200

Against lot 87, Harry Wardman, owner, amount assessed as benefits $200

Against lot 88, Harry Wardman, owner, amount assessed as benefits $200

Against lot 89, Harry Wardman, owner, amount assessed as benefits $200

Against lot 90, Harry Wardman, owner, amount assessed as benefits $200

Against lot 91, Harry Wardman, owner, amount assessed as benefits $200
Against lot 92, Harry Wardman, owner, amount assessed as benefits $250

Against parts of lots 7 and 9, Block 17, Todd and Brown's sub., Levy Court No. 2, p. 24, Surveyor's Office, D. C., described as follows:

Against all that part of lot 7 not condemned for the extension of Eleventh Street, L. and A. Steerman, owner, amount assessed as benefits..... $1000
Against all that part of lot 9, not condemned for the extension of Eleventh Street, Rose Wallach, owner, amount assessed as benefits $2000

41 Against certain lots in Block 17, Todd and Brown's Subdivision, and partly in Block 22, Columbia Heights, resubdivided into lots 23 to 28, County Book 11, p. 127, County Book 13, p. 40, Surveyor's Office, D. C., as follows:

Against lot 23, H. C. and A. G. Machette, owners, amount assessed as benefits $75
Against East 0.84 feet front of lot 25 and west 15.29 feet front by full depth of lot 24, W. S. Sheetz, owner, amount assessed as benefits..... $50
Against East 0.76 feet front of lot 26 and west 15.16 ft. front by full depth of lot 25, Wm. Johnson, owner, amount assessed as benefits..... $35
Against East 0.83 feet front of lot 27 and West 15.24 ft. front by full depth of lot 26, I. V. Townsend, owner, amount assessed as benefits..... $25
Against West 17.17 feet front by full depth of lot 27, M. E. McAdoo, owner, amount assessed as benefits..... $15
Against lot 28, M. E. McAdoo, owner, amount assessed as benefits $10
Against the east 53.16 feet front by full depth of lot 14, Block 22, Columbia Heights, C. M. Carter, owner, amount assessed as benefits..... $750

Against lots in Block 21, Columbia Heights, Book Governor Shepherd p. 137, Surveyor's Office, D. C., as follows:

Against all that part of lot 1, Block 21, not condemned for the extension of Eleventh street, Sarah P. Grogan, owner, amount assessed as benefits..... $500
Against all that part of lot 17, Block 21, not condemned for extension of Eleventh street, F. B. Brock, owner, amount assessed as benefits..... $500
Against all that part of lot 2, Block 21, not condemned for the extension of Eleventh street, J. H. Sweeney M. A. Dailey, owner, amount assessed as benefits..... $750

Against all that part of lot 14 not included in lot 41, L. C. F. Hugo, owner, amount assessed as benefits..... $50
Against all of lot 15, Block 21, M. C. Hooker, owner, amount assessed as benefits..... $200
Against all of lot 16, Block 21, E. V. Lane, owner, amount assessed as benefits..... $400

Against certain lots in Block 21, Columbia Heights resubdivided as lots 46 to 50, in County Book 16, p. 155, Surveyor's Office, D. C., as follows:

Against lot 46, A. Scott, owner, amount assessed as benefits $150
42 Against lot 47, C. L. Wright, Trustee, amount assessed as benefits $100
Against lot 48, A. and P. J. Osborn, owners, amount assessed as benefits $50
Against lot 49, C. C. Stouffer, owner, amount assessed as benefits $40
Against lot 50, C. Sebring, owner, amount assessed as benefits $25
Against part of lot 14, Block 21, Columbia Heights, resubdivided as lot 41, in County Book 16, p. 117, Surveyor's Office, D. C., Herbert W. Porter, owner, amount assessed as benefits $10

Against certain lots in Block 21, Columbia Heights, resubdivided as lots 52, 53 and 54, County Book 19, p. 142, Surveyor's Office D. C., as follows:

Against lot 52, M. F. Wild, owner, amount assessed as benefits $5
Against lot 53, C. W. Scudder, owner, amount assessed as benefits $10
Against lot 54, G. W. and M. F. Daw, owners, amount assessed as benefits..... $15
Against all that part of lot 5, Block 20, Columbia Heights not condemned for the extension of Eleventh street, M. B. Thorwarth, owner, amount assessed as benefits..... $650
Against all of lot 6, Block 20, Columbia Heights, N. M. L. Kenkins, owner, amount assessed as benefits..... $250
Against all of lot 8, Block 20 Columbia Heights, B. W. King, owner, amount assessed as benefits..... $30
Against all of lot 13, Block 20, Columbia Heights, P. Mauro, owner, amount assessed as benefits..... $50
Against all of lot 14, Block 20, Columbia Heights, W. C. Duvall, owner, amount assessed as benefits..... $150
Against all that part of lot 15 not condemned for the extension of Eleventh street, R. E. Gerhold, owner, amount assessed as benefits..... $500

Against lot 7, Block 20, Columbia Heights resubdivided as lots 53, 54 and 55, County Book 19, p. 123, Surveyor's Office, D. C., as follows:

Against lot 53, B. M. Dimick, owner, amount assessed as benefits $30

Against lot 54, G. W. Jacobs, owner, amount assessed as benefits $20

Against lot 55, C. Hand R. S. Hall, owner, amount assessed as benefits $10

43 Against all that part of lot 7, Block 47, Holmead Manor, not condemned for the extension of Eleventh street, J. H. Ellsworth, owner, amount assessed as benefits $300

Against all of lot 17, Block 47, Holmead Manor, Book Governor Shepherd, p. 167, Surveyor's Office, D. C., Jeannette R. Lenman, owners, amount assessed as benefits..... $50

Against all of lot 18, Block 47, Holmead Manor, Jeanette R. Lenman, owners, amount assessed as benefits..... $100

Against all that part of lot 19, Block 47, Holmead Manor not condemned for the extension of Eleventh street, J. R. Lemmon, owner, amount assessed as benefits..... $100

Against lot 8, Block 47, Holmead Manor, resubdivided into lots 46 and 47, County Book 20, p. 123, Surveyor's Office, D. C., as follows:

Against lot 46, L. E. Breuninger, owner, amount assessed as benefits $100

Against lot 47, L. E. Breuninger, owner, amount assessed as benefits $75

Against lots 18 to 29, Block 44, Holmead Manor, as by record in Book Governor Shepherd, p. 167, Surveyor's Office, D. C., as follows:

Against lot 18, Block 44, Alice G. Holmead, Alice M. O'Dwyer, Valinda R. Holmead, John H. Holmead, Wm. F. Holmead, Guida C. Callan, Cornelia A. Holmead, Heirs of Wm. Holmead, owners, amount assessed as benefits $5

Against lot 19, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $5

Against lot 20, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $5

Against lot 21, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $5

Against lot 22, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $5

Against lot 23, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $5

Against lot 24, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits..... $10

Against lot 25, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits $15
Against lot 26, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits $25
Against lot 27, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits $50
Against lot 28, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits $75
Against lot 29, Block 44, Heirs of Wm. Holmead, owners, amount assessed as benefits $300
44 Against lot 3, Block 45, Holmead Manor, Heirs of Wm. Holmead, owners, amount assessed as benefits $25
Against lot 4, Block 45, Holmead Manor, C. C. Pechin, owner, amount assessed as benefits $15
Against lot 5 Block 45, Holmead Manor, L. W. Calver, owner, amount assessed as benefits $10
Against lot 6, Block 45, Holmead Manor, E. B. Fitzgerald, owner, amount assessed as benefits $5
Against lot 7, Block 45, Holmead Manor, E. B. Fitzgerald, owner, amount assessed as benefits $5
Against lot 68 in Block 45, Holmead Manor, as by resubdivision in County Book 11, p. 103, Surveyor's Office, D. C., D. B. Appel, owner, amount assessed as benefits .. $25
Against lot 22 in Block 45, Holmead Manor as by resubdivision in County Book 8, p. 46, Surveyor's Office, D. C., J. F. Siems, owner, amount assessed as benefits $5
Against lot 23 in Block 45, Holmead Manor, as by resubdivision in County Book 8, p. 46, Surveyor's Office, D. C., R. H. and A. A. Warren, owners, amount assessed as benefits $5

Against certain lots in Block 45, Holmead Manor shown in resubdivision as lots 56 to 59, County Book 11, p. 70, Surveyor's Office, D. C., as follows:

Against lot 56, E. M. Adams, owner, amount assessed as benefits $2.50
Against lot 57, L. Richmond, owner, amount assessed as benefits $2.50
Against lot 58, S. Ruffin, owner, amount assessed as benefits. $2.50
Against lot 59, J. H. Aubere, owner, amount assessed as benefits $2.50

Against lots in Block 45, Holmead Manor, shown in subdivision as lots 69 to 74, County Book 11, p. 105, Surveyor's Office, D. C., as follows:

Against lot 69, R. G. Proctor, owner, amount assessed as benefits $20
Against lot 70, E. M. Power, owner, amount assessed as benefits $15

Against lot 71, J. M. Henderson, owner, amount assessed as benefits $25

Against lot 72, M. C. Peterson, owner, amount assessed as benefits $35

Against lot 73, M. C. Peterson, owner, amount assessed as benefits $55

45 Against lot 74, A. L. Hough, owner, amount assessed as benefits..... $150

Against lot 23, Block 47, Holmead Manor, H. W. Van Senden, owner, amount assessed as benefits..... $50

Against that part of lot 22, Block 47, Holmead Manor, having a frontage of 50 feet and depth of 100 feet, Thos. A. Brown, owner, amount assessed as benefits..... $75

Against parts of lots 21 and 22, Block 47, Holmead Manor as follows: Beginning at northeast corner of said lot 21; thence southeasterly along east side of said lot one hundred feet; thence northeast at right angles 50 feet; thence southeast along east line of lot 22 to its southeast corner; thence southwest one hundred feet to the southwest corner of said lot 21; thence along the west side of lot 21, along Eleventh street extended, and along the north side of said lot 21 to the beginning, Fannie E. Pate, owner, amount assessed as benefits..... $250

Against all those parts of lots 39 and 40, Block 47, Holmead Manor, as by County Book 11, p. 89, Surveyor's Office, D. C., excepting parts condemned for Eleventh street, M. A. Meyers, owner, amount assessed as benefits..... $200

Against lots 43, 44 and 45, Block 47, Holmead Manor, as shown by resubdivision in County Book 19, p. 164, Surveyor's Office, D. C., as follows:

Against lot 43, L. J. Doolittle, owner, amount assessed as benefits $25

Against lot 44, Thos. O. May, owner, amount assessed as benefits $50

Against lot 45, E. Williamson, owner, amount assessed as benefits $75

Against the west half of the front by full depth of lot 3, Block 47, Holmead Manor, Joseph H. Sweeney and Margaret A. Dailey, owners, amount assessed as benefits..... $15

Against the east half of the front by full depth of lot 3, Block 47, Holmead Manor, Charles Renshaw, owner, amount assessed as benefits..... $10

Against lot 19, Block 20, Columbia Heights J. W. Paine, owner, amount assessed as benefits..... $100

Against lot 20, Block 20, Columbia Heights Harry Wardman, owner, amount assessed as benefits..... $50

Against lot 52, Block 20, Columbia Heights as recorded in County Book 19, p. 45, Surveyor's Office, D. C., M. B. Dodge and J. A. I. Cassedy, owners, amount assessed as benefits $750

46 Against lots in Block 20, Columbia Heights resubdivided as lots 43 to 48 in County Book 16, p. 19, Surveyor's Office, D. C., as follows:

Against lot 43, M. D. Hensey and W. H. Conley, Trustees, amount assessed as benefits..... $260
Against lot 44, M. D. Hensey and W. H. Conley, Trustees, amount assessed as benefits..... $115
Against lot 45, M. D. Hensey and W. H. Conley, Trustees, amount assessed as benefits..... $127
Against lot 46, M. D. Hensey and W. H. Conley, Trustees, assessed as benefits..... $133
Against lot 47, M. D. Hensey and W. H. Conley, Trustees, amount assessed as benefits..... $138
Against lot 48, M. D. Hensey and W. H. Conley, Trustees, amount assessed as benefits..... $150

Against lots in Block 20, Columbia Heights and Block 19, Todd and Brown Subdivision resubdivided into lots 23 to 32 in County Book 11, p. 146, Surveyor's Office, D. C., as follows:

Against lot 26, E. C. Allen, owner, amount assessed as benefits $5
Against lot 27, E. J. Pullman, Trustee, amount assessed as benefits $10
Against lot 28, Kennebunk Realty Co., amount assessed as benefits $15
Against lot 29, M. H. Little, owner, amount assessed as benefits $25
Against lot 30, H. V. Minnix, owner, amount assessed as benefits $50
Against lot 31, R. Thompson, owner, amount assessed as benefits $75
Against lot 32, with full front to a depth of 150 feet, C. H. L. Macdonald, owner, amount assessed as benefits.. $100
Against the east 17 feet front by depth of 110 feet of lot 2, Block 20, Columbia Heights Wm. W. Riley, owner, amount assessed as benefits..... $125
Against 17 feet front next to the east 17 feet front by depth of 110 feet of lot 2, Block 20, Columbia Heights, G. M. Davis, owner, amount assessed as benefits..... $125
Against all that part of lot 32, Block 20, Columbia Heights as lies north of alley shown in County Book 19, p. 56, Surveyor's Office, D. C., Chas. H. L. Macdonald, owner, amount assessed as benefits..... $50
47 Against lot 2, Block 18, Todd and Brown Subdivision, A. J. Sorrells, owner, amount assessed as benefits $50
Against lot 3, Block 18, Todd and Brown Subdivision, A. J. Sorrells, owner, amount assessed as benefits..... $100

Against the east 12.5 feet front by full depth of lot 8, Block 18, Todd and Brown's Subdivision J. T. Arms, owner, amount assessed as benefits..... $12

Against part of lot 8, Block 18, Todd and Brown Subdivision, being 16.67 feet by full depth of lot and distant 12.5 feet from east side of said lot 8, D. Crawford, owner, amount assessed as benefits..... $15

Against part of lot 8, Block 18, Todd and Brown's Subdivision being 16.67 feet front by full depth of lot 8 and distant 4.16 feet from west line of said lot 8, G. Ware, owner, amount assessed as benefits..... $15

Against the west 4.16 feet front of lot 8, and the east 16.66 feet front of lot 7 by full depths of lots in Block 18, Todd and Brown Subdivision, D. Catlett, owner, amount assessed as benefits..... $8

Against part of lot 7, Block 18, Todd and Brown Subdivision being 16.67 feet front by full depth of said lot 7 distant 16.66 feet from east line of said lot 7, H. Lomax, owner, amount assessed as benefits..... $60

Against lot 42, Block 18, Todd and Brown Subdivision as by record in County Book 16, p. 122, Surveyor's Office, D. C., R. W. Williams, owner, amount assessed as benefits. $40

Against lots in Block 21, Columbia Heights and Block 18, Todd and Brown Subdivision resubdivided as lots 26 to 34 County Book 16, p. 11, Surveyor's Office, D. C., as follows:

Against lot 26, H. T. Jones, owner, amount assessed as benefits $150

Against lot 27, H. T. Jones, owner, amount assessed as benefits $150

Against lot 28, H. T. Jones, owner, amount assessed as benefits $150

Against lot 29, H. T. Jones, owner, amount assessed as benefits $150

Against lot 30, H. T. Jones, owner, amount assessed as benefits $140

Against lot 31, G. G. Brown, owner, amount assessed as benefits $150

Against lot 32, S. A. Putnam, owner, amount assessed as benefits $500

Against lot 33, H. T. Jones, owner, amount assessed as benefits $75

48 Against lot 34, S. A. Putnam, owner, amount assessed as benefits..... $50

Against lots in Block 18, Todd and Brown Subdivision resubdivided as lots 55 to 63, County Book 20, p. 78, as follows:

Against lot 55, Harry Wardman, owner, amount assessed as benefits $250

Against lot 56, Harry Wardman, owner, amount assessed as benefits $150
Against lot 57, Harry Wardman, owner, amount assessed as benefits $150
Against lot 58, Harry Wardman, owner, amount assessed as benefits $150
Against lot 59, Harry Warman, owner, amount assessed as benefits $150
Against lot 60, Harry Wardman, owner, amount assessed as benefits $150
Against lot 61, Harry Wardman, owner, amount assessed as benefits $150
Against lot 62, Harry Wardman, owner, amount assessed as benefits $150
Against lot 63, Harry Wardman, owner, amount assessed as benefits $150

Against lot 2, Block 17, Todd and Brown Subdivision as recorded in Levy Court No. 2, p. 24, Surveyor's Office, D. C., M. S. Carpenter, owner, amount assessed as benefits. $50
Against lot 3, Block 17 Todd and Brown Subdivision, E. G. Olmstead, owner, amount assessed as benefits..... $100
Against lot 13, Block 17, Todd and Brown Subdivision, A. J. Miller, owner, amount assessed as benefits..... $100
Against the west 16.67 feet front by full depth of lot 14, Block 17, Todd and Brown Subdivision, T. R. Strothers, owner, amount assessed as benefits..... $25
Against 16.67 feet of front next to the west 16.67 feet of front by full depth of lot 14, Block 17, Todd and Brown Subdivision, W. W. Metcalf, owner, amount assessed as benefits $15
Against the east 16.67 feet front by full depth of lot 14, Block 17, Todd and Brown Subdivision, C. H. Ware, owner, amount assessed as benefits..... $10

Against lots in Block 17, Todd and Brown Subdivision recorded as lots 53 to 61, County Book 19, p. 121, Surveyor's Office, D. C., as follows:

Against lot 53, M. Reidy, owner, amount assessed as benefits $150
49 Against lot 54, K. L. Russell, owner, amount assessed as benefits..... $150
Against lot 55, M. E. Hutton, owner, amount assessed as benefits $150
Against lot 56, F. G. Parker, owner, amount assessed as benefits $150
Against lot 57, W. F. Morrow, owner, amount assessed as benefits $150
Against lot 58, Cath. Hessler, owner, amount assessed as benefits $150

Against lot 59, F. L. Edrington, owner, amount assessed as benefits $150
Against lot 60, C. E. Cumberland, owner, amount assessed as benefits $150
Against lot 61, S. R. Baulsir, owner, amount assessed as benefits $250

Against lots in Block 17, Todd and Brown Subdivision recorded as lots 39 to 46 in County Book 16, p. 131, Surveyor's Office, D. C., as follows:

Against lot 39, M. C. Levy, owner, amount assessed as benefits $400
Against lot 40, L. B. Batley, owner, amount assessed as benefits $150
Against lot 41, Wm. M. Smith, owner, amount assessed as benefits $150
Against lot 42, Chas J. Butler, owner, amount assessed as benefits $150
Against lot 43, Chas. J. Butler, owner, amount assessed as benefits $150
Against lot 44, Chas. J. Butler, owner, amount assessed as benefits $150
Against lot 45, Percy Russell, owner, amount assessed as benefits $150
Against lot 46, Percy Russell, owner, amount assessed as benefits $150

Against those lots in Block 16, Todd and Brown Subdivision as by record in Book Levy Court No. 2, p. 24, Surveyor's Office, D. C., as follows:

Against all that part of lot 11, Block 16, not condemned for the extension of Eleventh Street, S. Dana Lincoln, *et al.*, owners, amount assessed as benefits..... $800
Against lot 12, Block 16, Rose Wallach, owner, amount assessed as benefits..... $400
Against lot 13, Block 16, Rose Wallach, owner, amount assessed as benefits..... 50

Against those lots in Block 16, Todd and Brown Subdivision resubdivided as lots 93 to 104 in County Book 20, p. 134, Surveyor's Office, D. C., as follows:

50 Against lot 93, John Miller and M. J. Keane, owners, amount assessed as benefits..... $10
Against lot 94, John Miller and M. J. Keane, owners, amount assessed as benefits..... $30
Against lot 95, John Miller and M. J. Keane, owners, amount assessed as benefits..... $50
Against lot 96, John Miller and M. J. Keane, owners, amount assessed as benefits..... $300

Against lot 97, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 98, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 99, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 100, John Miller and M. J. Keane, owners amount assessed as benefits..... $200
Against lot 101, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 102, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 103, John Miller and M. J. Keane, owners, amount assessed as benefits..... $200
Against lot 104, John Miller and M. J. Keane, owners, amount assessed as benefits..... $10

Against lots and parts of lots in Block 15, Todd and Brown Subdivision, Levy Court No. 2, p. 24, Surveyor's Office, D. C., as follows:

Against all that part of lot 5, Block 15, not condemned for the extension of Eleventh Street, A. M. Cocks, owner, amount assessed as benefits..... $300
Against all of lot 6, Block 15, A. M. Cocks, owner, amount assessed as benefits..... $700
Against all of lot 7, Block 15, M. A. Wadhams, owner, amount assessed as benefits..... $50
Against all of lot 2, Block 15, R. B. Bare, owner, amount assessed as benefits $100
Against all of lot 3, Block 15, J. W. Morris, — amount assessed as benefits..... $700
Against all that part of lot 4, Block 15, not condemned for the extension of Eleventh street, J. W. Morris, owner, amount assessed as benefits..... $300

Against all of lot 2, Block 14, Todd and Brown Subdivision, J. B. Lybrook, owner, amount assessed as benefits..... $50
Against a part of Block 14, Todd and Brown's Subdivision; Beginning at the southwest corner of lot 2 in said Block 14, as recorded in Levy Court No. 2, p. 24, Surveyor's Office, D. C., thence northerly along the west line of said lot 2; thence at right angles thereto and westerly 74.17 feet to Eleventh street; thence southwest 151.00 to a point 91.64 feet from the beginning; thence to place of beginning, J. B. Lybrook, owner, amount assessed as benefits. $1500
51 Against lot 9, Block 14, Todd and Brown's Subdivision, Mary C. Sullivan, amount assessed as benefits $50

Against lots in Block 14, Todd and Brown's Subdivision, resubdivided as lots 46 to 53, in County Book 16, p. 23, Surveyor's Office, D. C., as follows:

Against lot 46, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250
Against lot 47, Adams-Monroe Manufacturing Company, owners, amount assessed as benefits..... $250
Against lot 48, E. I. Skinner *et al.*, owners, amount assessed as benefits $250
Against lot 49, F. Fraser, owner, amount assessed as benefits. $250
Against lot 50, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250
Against lot 51, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250
Against lot 52, M. P. Hufty, owner, amount assessed as benefits $250
Against lot 53, G. C. Muller, owner, amount assessed as benefits $400

Against all of lot 2, Block 13, Todd and Brown Subdivision, A. Brandt, owner, amount assessed as benefits..... $50
Against all of lot 3, Block 13, Todd and Brown's Subdivision, A. P. Stewart, owner, amount assessed as benefits..... $100
Against all that part of lot 7, Block 13, Todd and Brown's Subdivision, not included in the condemnation of Eleventh Street, G. S. Cooper, owner, amount assessed as benefits.... $100
Against all that part of lot 8, Block 13, Todd and Brown's Subdivision not included in the condemnation of Eleventh street, Rose Wallach, owner, amount assessed as benefits.. $800
Against all of lot 9, Block 13, Todd and Brown Subdivision, A. J. Miller, owner, amount assessed as benefits..... $350
Against all of lot 10, Block 13, Todd and Brown's Subdivision, J. Laing and W. G. Gray, owners, amount assessed as benefits $50

Against those lots in Block 13, Todd and Brown's Subdivision subdivided as lots 16 to 23 in County Book 19, p. 10, Surveyor's Office, D. C., as follows:

52 Against lot 16, F. G. Carpenter, owner, amount assessed as benefits $400
Against lot 17, F. G. Carpenter, owner, amount assessed as benefits $275
Against lot 18, F. G. Carpenter, owner, amount assessed as benefits $275
Against lot 19, F. G. Carpenter, owner, amount assessed as benefits $275
Against lot 20, F. G. Carpenter, owner, amount assessed as benefits $275
Against lot 21, F. G. Carpenter, owner, amount assessed as benefits $275

Against lot 22, F. G. Carpenter, owner, amount assessed as benefits $275
Against lot 23, F. G. Carpenter, owner, amount assessed as benefits $275

Against lots or parts of lots in Block 12, Todd and Brown's Subdivision, Levy Court No. 2, p. 34, Surveyor's Office, D. C., as follows:

Against all of lot 3, Block 12, M. G. Schaefer, owner, amount assessed as benefits..... $50
Against all of lot 4, Block 12, M. G. Schaefer, owner, amount assessed as benefits..... $300
Against all of lot 5, Block 12, S. M. Chase, owner, amount assessed as benefits..... $750
Against all that part of lot 6, Block 12, not condemned for the extension of Eleventh street, Mary A. Wadhams, owner, amount assessed as benefits..... $300
Against all that part of lot 7, Block 12, not condemned for the extension of Eleventh street, S. E. Henry, owner, amount assessed as benefits..... $50
Against all that part of lot 8, Block 12, not condemned for the extension of Eleventh street, S. E. Henry, owner, amount assessed as benefits..... $800
All of lot 9, Block 12, C. S. Bundy, owner, amount assessed as benefits $350
All of lot 10, Block 12, R. F. Elliott, owner, amount assessed as benefits $50
All of lot 3, Block 11, Todd and Brown's Subdivision, Rose Wallach, owner, amount assessed as benefits..... $50
All of lot 4, Block 11, Todd and Brown's Subdivision, C. H. Wiltsie, owner, amount assessed as benefits..... $100

Against lots in Block 11, Todd and Brown's Subdivision subdivided as lots 10, 11 and 12 in County Book 13, p. 29, Surveyor's Office, D. C., as follows:

53 Against lot 10, Julia D. Simmons, owner, amount assessed as benefits..... $800
Against lot 11, Julia D. Simmons, owner, amount assessed as benefits $800
Against lot 12, Julia D. Simmons, owner, amount assessed as benefits $1200

Against lots 294 to 299 part of Mount Pleasant as subdivided by L. H. Schneider and others in County Book 14, p. 25, Surveyor's Office, D. C., as follows:

Against lot 294, C. G. Schneider, owner, amount assessed as benefits $2200
Against lot 295, C. G. Schneider, owner, amount assessed as benefits $200

Against lot 296, L. H. Schneider, *et al.*, owners, amount assessed as benefits $200
Against lot 297, L. H. Schneider, *et al.*, owners, amount assesses as benefits $200
Against lot 298, C. G. Schneider, owner, amount assessed as benefits $200
Against lot 299, C. G. Schneider, owner, amount assessed as benefits $200
Against Garfield Hospital with a frontage of 562.48 feet on Eleventh street to a depth of 200 feet..... $6700

54 *Affidavit of Leo Simmons and Memorandum of Justice Gould.*

Filed February 5, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556.

Personally appeared Leo Simmons and being duly sworn, says that he is one of the respondents and owner of part of lot 5, situated at the S. E. corner of 11th & Columbia Road, which has been assessed to the extent of $2000 by the jury in this case. That he also represents other respondents in said cause and did represent them on the 17th day of June 1904, when the order passed on that date by Mr. Justice Gould, which purports to direct the Commissioners of the District of Columbia to proceed in the premises in accordance with the Act of June 6, 1900, was signed. That at the time said order was passed, affiant was present in Court and objected to its being signed. That the order so signed was already prepared when brought into Court by the late Andrew B. Duvall who handed same to Mr. Justice Gould for his signature. That at the time said order was signed, no hearing upon same was had, and the question as to whether or not the petitioners in said case should proceed under the Act of June 6, 1900 or under the Act of March 3, 1889 was not argued or considered by the Court, so far as affiant saw any-
55 thing to indicate any consideration, and that affiant objected to the signing of said order at the time. That affiant had seen neither the original or a copy of said order, and only knew from the statement to the Court by the said Andrew B. Duvall that it was a direction to the Commissioners to proceed in the case in accordance with the Act of June 6 aforesaid. Affiant's recollection of the matter in relation to said order is that he had served notice on Mr. Duvall of a motion to dismiss the cause, but did not file the original motion, intending to file same at the time of the hearing, and, as aforesaid, when Mr. Duvall came into Court he had an order already prepared indicating his willingness to proceed in the matter, in accordance with said order. On objection being made by affiant, the Court, Mr. Justice Gould, suggested that any objection

affiant desired to make, could be taken advantage of in the future, as he deemed it unnecessary to have any hearing in relation to same then. Affiant asked Mr. Justice Gould if he would not require the petitioners to serve notice on the attorneys of record in said case before the petition was filed. Mr. Justice Gould indicated his willingness so to do and nothing more was said about the matter. Affiant afterwards learned that the supplemental petition filed in said cause without notice was so filed by permission of Mr. Justice Barnard, (the only Justice holding Court during the summer vacation) who affiant believes was not aware of the facts referred to. Affiant herewith attaches to this affidavit as a part of same, a statement which he received from Mr. Justice Gould in relation to the facts sur-
56 rounding the signing of said order.

LEO SIMMONS.

Subscribed and sworn to before me this 5th day of February, 1907.

J. R. YOUNG, *Cl'k*,
By F. E. CUNNINGHAM, *Ass't Cl'k*.

Supreme Court of the District of Columbia, Justice's Chambers.

JAN'Y 31, 1907.

In the matter of the Extension of Eleventh Street (District Case No. 556) my recollection is that at the time I signed the order of June 17, 1904, wh. directs the petitioners to proceed in the matter of the re-assessment of benefits in accordance with the provisions of the Act of June 6 1900, there was no discussion as to the Act under wh. the petitioners should proceed; at least, I gave the question no consideration. I have no remembrance of Mr. Simmons consenting to the order.

ASHLEY M. GOULD, *Justice*.

57 *Opinion.*

Filed May 6, 1907.

Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

Decided May 6, 1907.

Hearing on exceptions to the verdict of the jury in proceedings to assess benefits in the matter of the extension of Eleventh street. Exceptions overruled and verdict confirmed.

Mr. John Ridout, Mr. James H. Hayden, Mr. Samuel Maddox, Mr. Leo Simmons, Mr. E. A. Newman, Mr. H. Prescott Gatley, Mr. Alan O. Clephane, and Messrs. Hufty & Hufty for the exceptants.

Mr. A. Leftwich Sinclair and Mr. James Francis Smith for the petitioners.

Mr. Justice BARNARD delivered the opinion of the Court:

On March 3, 1899, Congress passed an act entitled "An act to extend S street, in the District of Columbia, and for other purposes." 30 Statutes at Large, 1344. Among the other purposes, section 3 of said act provides that the Commissioners are authorized and directed to institute, by petition, a proceeding to condemn the land necessary for the extension of Eleventh street northwest, on a straight extension of lines thereof, as now established in the city of Washington, with a width of 90 feet from Florida avenue to Harvard street, and thence with the same width, and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue.

The said act provided for the selection of a jury, and other proceedings, for the condemnation of the land necessary for said extension, under and according to the provisions of Chapter 11 of the Revised Statutes of the United States, relating to the District of Columbia. Sections 246-270, Revised Statutes of the District of Columbia.

Said section 3 provided that when the amount of damages should be found, that the jury in such proceeding should assess at least one-half of said amount against the land abutting on that portion of the street to be opened, extending to a depth of 200 feet from the building lines of said Eleventh street, as extended.

Section 9 of said act provides that payment of the awards made in respect to the property condemned shall not be made until the assessments provided for shall have been made against the aforesaid property and duly confirmed.

Section 257 of the Revised Statutes relating to the District of Columbia provides for the summoning of a jury of seven judicious, disinterested men, not related to any party interested, to assess the damages.

Section 7 of the act of March 3, 1899, modifies the said highway condemnation act contained in the said Revised Statutes in some respects, section 7 providing that the sums to be assessed against each
piece or parcel of ground shall be determined and designated
58 by the jury taking into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets; and when the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof, from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as hereinbefore provided.

A jury was summoned by the marshal and proceeded to award damages and benefits for the said extension of Eleventh street under the authority of the said statutes; and on February 16, 1900, returned their verdict to the court; and an order *nisi* was passed on the 19th day of March, 1900, confirming the said verdict, unless cause

to the contrary should be shown on or before the 19th day of April, 1900. Protests against such confirmation, or exceptions thereto, were filed by a number of parties interested; and finally, after hearing these objections, and after an amendatory law had been passed by Congress on June 6, 1900 (31 Statutes at Large, 665), the court, on July 3, 1900, signed a decree confirming the award of damages for the land condemned for the extension of Eleventh street, and directing payment of the several sums found to be due for such lands, in accordance with the act of March 3, 1899, and the amendments thereof, approved June 6, 1900; and further decreeing that the assessment benefits made by the said jury should be set aside as null and void.

From so much of the said decree as declared the assessments for benefits to be illegal, null, and void, the petitioners, the Commissioners of the District of Columbia, took an appeal to the Court of Appeals. This case was docketed in the Court of Appeals as No. 1039, and was entitled "John B. Wright *et al.*, Commissioners, etc., against Eugene Byrnes *et al.*," and later became known as "Henry B. F. Macfarland *et al.*, Commissioners, etc., *v.* Said Byrnes *et al.*," Commissioner Wight's term of office having expired, and said Macfarland having been appointed in his place. This case came on for hearing in the Court of Appeals, and on April 1, 1902, that court, in an opinion delivered by Mr. Justice Morris, reversed the decree appealed from, and remanded the cause to this court, with directions to vacate such part of said order, and for such further proceedings in the cause according to law, as may be right and just. This case is reported in 19 Appeals D. C., 531; 30 Wash Law Rep., 237.

The case was thereupon appealed by the Commissioners to the Supreme Court of the United States, which appeal was dismissed by said court, at the October term, 1902, Mr. Justice Shiras delivering the opinion of the court, reported in 187 U. S., 246. The reason for dismissing the appeal was that the decree of the Court of Appeals, reversing the order of this court, and sending the case back for further proceedings, was not a final decree. Thereupon the mandate of the Supreme Court was sent down to the Court of Appeals, and the mandate of that court sent to this court and filed herein on July 22, 1903. This mandate says: "You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

On November 13, 1903, the petitioners filed a motion to ratify and confirm the said verdict as to the assessment for benefits in conformity with the said mandate of the Court of Appeals. Nothing further appears to have been done in the case until March 4, 1904, which was in the January term, when the court signed a decree vacating the decree which set aside the said assessment for benefits, in accordance with said mandate; and, thereupon, on further hearing the case on the said motion of the said petitioners for confirmation of the said assessment for benefits, according to the verdict of the

said jury of seven, and after argument by counsel for the parties, and due consideration of the exceptions of the respondents, from which it appears to the court that they and each of them were dissatisfied with said verdict, it was by the court ordered that the said motion to confirm be, in all respects, overruled; and further, that in case the petitioners desired to proceed further in the premises, that they should within a reasonable time make application to the court for directing the marshal to summon a jury of twelve, as provided by law. The petitioners entered an appeal from that decree, which was never perfected.

On June 17, 1904, being at the same term, the court signed another order, recited to be upon consideration of the proceeding herein, and the motion filed by Abner Greenleaf, and others, which modified the order of March 4, by ordering the petitioners to proceed within sixty days from that date, in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the said act of Congress, approved June 6, 1900. In pursuance of said last order, and by leave of the court, the said petitioners, the Commissioners of the District of Columbia, on August 9, 1904, filed an amended and supplemental petition, in which they set forth, first, the filing of the original petition herein on May 31, 1899, pursuant to the said act of Congress of March 3, 1899; second, the order directing the marshal to summon the jury to assess the damages and benefits, by reason of the said extension of Eleventh street, under the said act; third, that the jury was summoned and empaneled, and proceeded to assess the said damages and benefits, and filed its verdict on February 16, 1900; fourth, the signing of the order of ratification *nisi*, and the final order on July 3, 1900, confirming the verdict as to the award for damages, and vacating the same as to the assessment for benefits; fifth, reciting the appeal to the Court of Appeals, and the order of reversal therein; sixth, reciting the said order of March 4, 1904, in this court, from which it appeared that the exceptants were dissatisfied with the said verdict; seventh, referring to the said act of June 6, 1900; and, eighth, referring to the said order of June 17, 1904, directing them to proce-d within sixty days, under the said act of June 6, 1900.

On February 6, 1906, a motion was filed by George S.
59 Cooper, by his attorney, Leo Simmons, to strike out the said amended and supplemental petition of the Commissioners, because the same was improvidently filed, and because it was filed without authority of law, and because the court had lost jurisdiction over the parties, and their successors or assigns could not be brought into court under such a proceeding. A motion was also filed by the respondents represented by Mr. Simmons, on the same day, to dismiss the said amended petition for want of prosecution. February 6, 1906, both of these motions were overruled by the court, without prejudice.

On October 27, 1904, an order of publication was made, pursuant to the order passed herein on June 17, 1904, and the provisions of the said act of June 6, 1900, and reciting that the petitioners had filed the said amended and supplemental petition, and requiring

all persons interested to appear herein on or before November 28, 1904, and to continue in attendance, etc. Said order was published in the Washington Law Reporter, the Evening Star, the Washington Post, and the Washington Times, and proof of publication thereof was filed on February 9, 1906. On the same day the court passed an order directing the marshal to summon a jury of seven to reassess the benefits resulting from the extension of Eleventh street, in accordance with the said act of June 6, 1900.

Thereafter, to wit, on February 16, 1906, Mr. George S. Cooper, by Leo Simmons, his attorney, filed a renewal of his motion to strike out the said amended petition, filed on August 17, 1904, for the same reasons contained in his prior motion, and on March 9th the said motion was overruled by the court, reserving to the respondents the right to interpose such defenses as they could have had if the suit had been begun anew.

On March 16, 1906, the jury was accepted and sworn, in accordance with the provisions of the said act of June 6, 1900, and they were ordered to view and examine the land affected by the proceedings herein, and to proceed, on the 28th of March, 1906, at 2 o'clock p. m., and from time to time thereafter, in the United States courthouse, but without the presence of the court, to hear the evidence, and thereafter to assess the benefits to the lands benefited by the said extension of Eleventh street, in accordance with the said act.

Thereafter, certain of the owners filed pleas in bar to the said amended and supplemental petition, based on the statute of limitations, and averring that the cause or right of action in said petition set forth, did not accrue within three years next before the filing of said suit, or supplemental petition. Some of them also filed pleas in bar, claiming thereby that no proceeding could be taken under the act of June 6, 1900, but that a reassessment of benefits, if any, could only be had under the said act of March 3, 1899, and by a jury of twelve. These pleas were not disposed of by the court, but remained in the case, to be considered at the final hearing, after the jury should have reported a verdict.

On May 31, 1906, the parties represented by Mr. Simmons filed a motion to discharge the jury, on the ground that it was illegally constituted, because the members had not been selected and summoned by the U. S. Marshal of the District of Columbia, as required by law. That motion was overruled on the same day, without prejudice to the respondents to have the same considered on hearing of the motion for confirmation of verdict when rendered.

The jury returned its verdict, assessing the benefits, on June 6, 1906; and thereafter, the respondents filed numerous exceptions to the said verdict, stating various grounds of objection. On December 21, 1906, the petitioners filed a motion to finally ratify and confirm the verdict and assessment, notwithstanding such exceptions filed. That motion was continued for hearing from time to time, until it was argued and submitted to the court in February, 1907.

Counsel for respondents contend that the jury was illegally constituted, because the members of it had been selected and summoned by the deputy marshal instead of by the marshal in person.

I am not able to see that the act of June 6, 1900, authorizing the marshal of the District of Columbia to summon jurors, requires that he should do this personally. The law authorizes him to have deputies (sec. 186, Code, and secs. 780, 782, R. S. U. S.), thus seeming to recognize the fact that his duties are so numerous and so variant that it would be impossible for him to perform them all personally.

Section 4 of the said act says that the jurors are to be summoned by the marshal of the District of Columbia, and does not say, "or by his deputies," although those words are used in the preceding section. That fact is not conclusive in my mind that the lawmakers intended the jurors should be summoned by the marshal personally.

The language used for the summoning of grand and petit jurors in this District is similar to that used in said section 4, as will be seen by sections 210 and 211 of the Code, and by section 209, under certain contingencies, the court is authorized to direct the marshal to summon talismen. In neither of these sections is any reference made to the deputy marshal, and yet it will hardly be contended that the marshal may not properly discharge the duties required of him by these sections, by his deputy or deputies.

Section 4 of said act of June 6, 1900, provides that before accepting the jury, the court shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror, or cause any vacancy in the jury, when empaneled, to be filled; and it appears in this case that notice was given to the counsel for the respondents, of the time and place when the said jury would appear for acceptance, and be sworn, and given directions when and how to proceed with their duties; and at that time a number of counsel were present, and had the opportunity, if they so desired, to object to any of the said jurors, or to question any of the said jurors, as to their qualifications for service in this proceeding; and if said counsel chose to allow the said jurors then to be accepted and sworn, without raising any objections, because of the manner of their selection, or because of any technical reason, it seems to me that they waived such point, and they would be afterward estopped from raising the same; and especially after going before such jurors, and offering testimony on the merits of the proceeding. The notice which appears to have been given to the various attorneys for respondents contained the names of the jurors, and the fact that they were selected under the provisions of the act of June 6, 1900, and that the court would be requested to empanel and swear said jury at 10 o'clock a. m., on March 16, 1906.

The counsel also object to the form of the oath that was administered to said jury, the record disclosing that they were sworn in accordance with the provisions of the said act of June 6, 1900. The court must presume that all the provisions of said act, so far as the oath was concerned, were complied with, in the absence of any definite contradiction of the record.

It might also be said that the said order of March 16, 1906, accepting the said jury, and reciting that the said jurors were summoned by the marshal, would preclude the contention thereafter in this proceeding, and with no change of circumstances, that such was not the fact. Every presumption would be in favor of the varity of said order.

Counsel for respondents contend that the Statute of Limitations, which is pleaded, debars the District of Columbia from the right of having any of the benefits, occasioned by the Extension of Eleventh street, assessed against the property benefited, the argument being that the act of June 6, 1900, gave the District the right to proceed at once to have the assessment made, and that unless the municipality did proceed within three years from that date, it would be barred by the general Statute of Limitations. It seems to me that the District of Columbia had the right to take the opinion of the Court of Appeals, and of the Supreme Court, on the question of the propriety of the order passed in this court, vacating so much of the said verdict as assessed benefits, before it should be called upon to institute any new proceeding to reassess the said benefits. So that if the Statute of Limitations is applicable at all in this case, upon which question the court does not now desire to express any opinion, the earliest time when the statute began to run would seem to be July 22, 1903, when the mandate from the Court of Appeals was filed in this court.

Thereafter, it appears, this court signed the order of March 4, 1904, overruling the motion to confirm the former verdict, on the ground that the acceptants were dissatisfied therewith, and giving the District Commissioners leave to proceed within a reasonable time, to apply for a jury of twelve. On June 17, 1904, the court seems to have considered this order indefinite or undesirable, and on motion of some of the exceptants, ordered the Commissioners to proceed within sixty days from the date, under the provisions of the said act of June 6, 1900, this order taking the place of the order of March 4, 1904, so far as giving leave to proceed with the reassessment is concerned. Thereupon, the Commissioners did proceed, by filing said amended and supplemental petition within the said sixty days, and obtaining the order of publication on October 27, 1904, and finally, after considerable delay, securing a jury to make the reassessment of benefits, as provided by the said act of June 6, 1900.

While the Commissioners may be charged with moving slowly, and while they might have been more expeditious in pursuing the said proceeding, after filing their said amended petition, such delay could not amount to a bar, and I am, therefore, disposed to hold that the pleas of the Statute of Limitations, interposed by the several exceptants, are not well founded in law or fact, and that they afford no ground for refusing to confirm the verdict of the jury. I am also of the opinion that the pleas in bar which raise the question of the necessity of proceeding under the said act of March 3, 1899, and by a jury of twelve, must be overruled, and that the verdict must be considered on its merits.

The act of June 6, 1900, substituted a different proceeding, and thereby gave the Commissioners a choice of proceedings, if it did not by implication repeal the former act. Congress need not wait for the constitutionality of an act to be questioned in the courts before repealing or adding to the same. If a new law is passed, while such question is pending in court, and the old law is finally held to be constitutional, that judicial decision will not repeal the new law and reënact the old law.

It is contended by counsel for the respondents that the Court of Appeals in the said case of Macfarland *v.* Byrnes, decided that the respondents had a right to have a jury of twelve, and to proceed under the act of March 3, 1899, if they should so elect, and that the fact that the said act of March 3, 1899, had been held to be unconstitutional by the Court of Appeals would not be sufficient to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. The last part of this contention is no doubt correct, but it does not follow, when the respondents decline to accept the verdict of the jury, under the act of March 3, 1899, that they can still claim a right, or that it is the only method left open by the law for them to have a jury of twelve and proceed under that law.

The act of June 6, 1900, authorizes and directs the Commissioners of the District of Columbia to apply to this court for the final ratification and confirmation of the award of the jury, in respect to the damages for the lands condemned for the said extension of Eleventh street; and when said award is ratified said act provides for the payment of the said damages in accordance with the said act of March 3, 1899, "anything in said act to the contrary notwithstanding." This portion of the act of June 6, 1900, certainly changes the former law, section 9 of which prevented payment for damages until assessment for benefits had been made and confirmed. It is possible for the award of damages to be confirmed and the damages paid, without respect to the confirmation of the verdict assessing the benefits, under the said act of June 6, 1900, and such separation did in fact take place.

The award for damages was confirmed and the money paid, while the verdict, in so far as it assessed benefits, was vacated. It
61 turns out that the vacation of that portion of the verdict was erroneous, because it was based on the theory that the law, so far as such benefits were concerned, was unconstitutional; but when the constitutionality of the said act, in respect to said benefits, was determined by the courts, the said order vacating the said assessment was set aside, leaving the verdict to stand so far as that objection was concerned. Thereupon the said verdict assessing benefits came again before this court for final confirmation, when it was made to appear to the court that each of the respondents or acceptants was dissatisfied with said verdict, on its merits. Whereupon, instead of confirming the verdict, the court overruled the motion to confirm; and it first undertook to hold that the Commissioners might proceed under the act of March 3, 1899, by having the marshal summon a jury of 12; but the Commissioners, not taking any

step to proceed under the said act, by virtue of said order, the court, a little over three months later, but during the January term, passed the order of June 17, 1904, ordering the Commissioners to proceed within sixty days, in accordance with the act of June 6, 1900, thereby in effect setting aside or modifying its former order *pro tanto*.

It seems to me that this was competent for the court to do, on the theory that the dissatisfaction with the former verdict having been expressed by the property owners affected thereby, and insisted upon hearing the motion to confirm the said verdict, the court had no alternative but to refuse to confirm the verdict; and such refusal to confirm, and overruling of the motion to confirm, was, in effect, an adjudication by the court of the invalidity of the said verdict, because the order was accompanied with the permission to proceed again to obtain a new jury; and when the said order of June 17, 1904, was passed, it seems to me it was warranted by the provision of the act of June 6, 1900, which provided in the event that the assessment for benefits should for any reason be declared void, the Commissioners were authorized and directed to apply to the court for a reassessment of such benefits, in accordance with the provisions of the said act of June 6, 1900.

I do not understand that the Court of Appeals intended by the language used in the said case of Macfarland *v.* Byrnes to hold that such order and such proceeding would be improper. The Court of Appeals expressly refused to direct what the proceedings should be in this court, leaving the land owners the privilege of accepting the said verdict for assessment of benefits if they so elected; and on the other hand, if they elected to contest the matter further they were to have the opportunity to do so according to law.

If the act of March 3, 1899, had not been held to be constitutional, there could have been no proceeding for a reassessment of benefits under that law, or the act of June 6, 1900, either, for the foundation for the whole proceeding would have dropped out.

But when the law of March 3, 1899, was held to be constitutional, and when the act of June 6, 1900, modified it by providing for the separation of damages and assessments in the manner indicated; and when the effect of the subsequent order of the court was to adjudicate that the verdict making the assessment of benefits was void, because objected to by the land owners, then there seems to be no further method left for a reassessment than to follow the provisions of the act of June 6, 1900, because so far as that act is inconsistent with the act of March 3, 1899, it must necessarily repeal the former act; and it is inconsistent in several particulars, notably that of requiring a jury of seven instead of twelve, and in the matter of the oath of the jurors as to the assessment of benefits, and as to the land upon which said benefits could be assessed, and also as to the amount of such benefits.

Another contention is made by some of the exceptants that when this court overruled the motion to confirm the said verdict assessing the benefits, all the parties were out of court, and that no further proceeding could be built upon the record made up to that time,

because the court had lost jurisdiction. I can not agree with this contention, for the parties had been properly brought into court in the said original proceeding, under the act of March 3, 1899, and they continued in court until the final determination of that proceeding, and when the court refused to confirm the said verdict and set it aside, by overruling the motion to confirm, and giving the Commissioners leave to proceed further, the land owners were obliged to take notice of that order; and when the amended petition was fild and publication ordered and made under that, any other parties interested in the proceeding, which had been modified by the act of June 6, 1900, were given an opportunity to come in, and they did appear before the jury and submit evidence concerning the alleged benefits to their lands by reason of the extension of said street. Such appearance and participation in the trial before the jury, it seems to me, estops them from raising any question as to the jurisdiction by the court over the persons of the parties interested.

As to the argument that there could not be a reassessment which would extend over a greater area than that provided by the act of March 3, 1899, I hold that the act of June 6, 1900, expressly authorizes a reassessment of the benefits under the terms of said act; and that no contrary construction can be given to the act, by reason of the word "reassessment," although the assessment now in question may be more properly designated a new assessment, or a second assessment, rather than a reassessment. The law must be construed to carry out the evident meaning of the law makers, expressed by the words used in the statute being construed, and by the situation of the subject-matter of the law at the time it is enacted. Congress evidently contemplated that the award for damages might be confirmed and paid, and that the court might find the verdict assessing the benefits to be objectionable, and might refuse to confirm it; and when they passed the act of June 6, 1900, they were undertaking to provide a remedy for that situation, if it should arise.

Counsel contend that the assessment area provided for by the act of March 3, 1899, of two hundred feet on each side of said Eleventh street, is the only area against which benefits can be as-
62 sessed, under the act of June 6, 1900. I do not so construe the said act.

The first part of section 12, act of June 6, 1900, provides that certain sections of the act are made applicable to the several acts of March 3, 1899, entitled, "An Act to extend S street in the District of Columbia, and for other purposes," and "An Act for the extension of Pennsylvania avenue southeast, and for other purposes," *in so far as the same relate to the extension of Sixteenth street northwest, Pennsylvania avenue southeast, Staughton street, Eckington Place, Fifth street, and Howard avenue, except* that the assessment areas fixed by said several acts in reference to *said several streets* shall be and remain as in and by said acts of Congress provided. This language limits the application of that provision or exception as to the assessment areas to the six several streets or avenues named in said section; but the latter part of that section provides what shall apply to Eleventh street, namely, that if the assessment made by the for-

mer jury under the act of 1899 is for any reason declared void, then the Commissioners are authorized to apply for a second assessment of benefits under the said act of 1900—that is, without any exception or limitation as to the assessment areas.

A number of exceptions have been filed by the Garfield Memorial Hospital, against which the jury assessed $6,700, being on land fronting 562.48 feet on Eleventh street, and running back a depth of 200 feet. It is claimed by counsel for the hospital, that the correct name of the hospital is the Garfield Memorial Hospital, and that the jury has only called it the Garfield Hospital. Taking into consideration the location of the hospital, and its general name, and the description of its land as facing on Eleventh street, I can see no difficulty by reason of the word "Memorial" being left out of the name in the assessment of the jury, as it evidently refers to the Garfield Memorial Hospital.

The depth of the land, 200 feet, takes the portion on which the assessment is levied back of the ground said to have been obtained by the hospital by the deed of M. H. Schneider, of April 30, 1903, recorded in Liber 2725, folio 268, at the northern boundary; but I do not understand that it is claimed that the hospital does not own ground having a frontage of 562.48 feet on Eleventh street, and running back that depth 200 feet, although it holds the title under other deeds. I can see no reason why, if the ground was subject to assessment for benefits, that the assessment by the jury of the amount specified on the land specified, might not be valid.

The hospital urges that it is exempt from taxation for any purpose, and that, if assessments were made, under the terms of its title it would not be liable for a special assessment for benefits; but that the Commissioners of the District would be obliged to assume the same, and protect the hospital from any cost or expense by reason thereof. This may be true, but the court, sitting as a District court, does not appear to have jurisdiction to decide the question.

The statute directs the jury to assess the benefits on the pieces or parcels of land benefited by such extension, and the amount of the assessment for such benefits against the same; and the court has power to hear and determine objections filed to the verdict and award, and to set aside or vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable; but there seems to be no jurisdiction given the District court thereby to say what lands, if any, are exempt; and no discretion appears to be given to the jury to leave out of their consideration any lands because the title to the same may be in a hospital, or even in the municipal government, or in any church society, or other institution which might be exempt from taxation.

If the hospital is exempt, or if the District Commissioners, under the tenure by which the hospital holds the said lands, are obliged to assume the assessment, then that question can be disposed of after confirmation of the verdict; and, therefore, without deciding whether the hospital is required to pay these assessments, or is exempt from them, I am constrained to overrule the exceptions and to confirm the award, notwithstanding the argument of counsel in behalf of the hospital.

Other exceptions by various owners of property are filed, all of which I may perhaps dispose of generally, without making special remarks relating to each individual case. In brief, the objections are, that the jury assessed benefits caused by the extension of the railroad and the building of houses and other improvements in the neighborhood, and that they did not and could not have confined their assessment of benefits to the actual increase in value of the lands occasioned by the extension of Eleventh street only; and that for that reason the whole assessment should be set aside.

There are some difficulties, to be sure, in getting at exact justice in any case of this kind. The jury were fairly instructed what their duty was, and they honestly, in my judgment, endeavored to perform that duty. Being relieved from the necessity of confirming the assessment area to the 200-feet strip on each side of the street, they have in some instances gone beyond that, and they have also been relieved of the necessity of assessing any special amount, and have been told to assess benefits only where benefits existed, and to the extent of their existence caused by the extension of the street. The fact that they had to look backward instead of looking forward to judge these benefits may not have been more difficult than in the ordinary case to assess benefits before they have actually accrued to the lands, because in either case there must be some latitude given for the exercise of judgment.

Again it is claimed that the subdivisions made since the street was extended have affected the assessments wrongfully, because there have been combinations by which owners of lots have subdivided land and made the lots now front on Eleventh street which before were not fronting on Eleventh street, and that no benefits should be assessed to those lands because of the purchase and subdivision since the street was extended. It may be true, and it therefore is presumed, that such is the case, but I am unable to see that the combination or subdivision of the lands made since prevents the jury
63 from saying that the lands themselves were benefited by the extension of the street, even if no such changes had been made. If the subdivision or combination had not been made, the jury could possibly still have assessed the ground on the supposition that it would be made, because such subdivision or combination would be the most adavantageous use that could be made of the property, and it might be presumed that the interest of the owners of the various properties benefited would induce them to make such use of it.

At any rate, I am unwilling to disturb this verdict, by reason of any claims made by individual owners as to the amount of the assessment, because while it may be true that exact justice would require a few dollars more or less to be taken off of some lots, and a few dollars more or less to be added to other lots, still it is the office of the jury to fix that amount, and unless that duty has been performed in such a way as to convince the court that the assessment is unreasonable and unjust, the court would not undertake to disturb the verdict and require a new jury to make a reassessment.

If a new jury was empaneled at this time, it would still be further

from the date of the extension of the street, and the new jury would be perhaps more embarrassed than the present jury has been in ascertaining the exact amount of benefit to the neighboring lands, caused by the extension of the street.

On the whole case, therefore, I am disposed to overrule all the exceptions, and sign a decree confirming the verdict of the jury.

64 *Order Finally Ratifying and Confirming Verdict of Jury.*

Filed May 6, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. No. 556, District Court.

Upon motion of the Commissioners of the District of Columbia, the petitioners in the above-entitled cause, it is, by the Court, this 6th day of May A. D. 1907, adjudged, ordered and decreed, that the verdict and assessment of the jury returned and filed herein on the 6th day of June, A. D. 1906, be, and the same is hereby, finally ratified and confirmed, in all respects, notwithstanding the objections and exceptions filed thereto, which are hereby overruled.

By the court.

JOB BARNARD, *Justice.*

Memoranda.

May 16, 1907.—Appeal noted by Columbia Heights Realty Company and bonds for costs on such appeal fixed in the sum of One Hundred Dollars ($100).

65 May 23, 1907.—Appeal Bond approved and filed.

June 5, 1907.—Order extending time in which to settle exceptions and file Transcript of Record in Court of Appeals, to and including the 15th day of September, 1907.

June 14, 1907.—Order extending January Term 1907, of District Court to the 15th day of January, 1908, for the purposes of this case.

66 Supreme Court of the District of Columbia.

THURSDAY, *August 15th*, 1907.

Session resumed pursuant to adjournment, present presiding, Justice Job Barnard.

* * * * * * *

In re THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

Now come here again the Columbia Heights Realty Company and tender to the Court their bill of exceptions taken during the trial of this cause, and pray that the same may be duly signed and made part of the record, now for then, which is accordingly done.

67 *Bill of Exceptions.*

Filed August 15, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET. No. 556.

Be it remembered that on the — day of Feb. 1906 the Counsel for the Columbia Heights Realty Company appeared in Court and moved to strike out the amended and supplemental bill filed in this case on the 9th day of August, 1904 on the grounds that the said supplemental bill or petition was filed without authority of law and not in conformity to the order of March 4, 1904, and on the further grounds that if any suit was to be prosecuted under the Act of June 6, 1900 it should be by a new proceeding, which motion was overruled without prejudice.

And thereupon Counsel on the — day of February, 1906 again appeared in Court and renewed their motion to strike out the amended and supplemental bill on the grounds above mentioned and the Court overruled said motion and the Appellant excepted. The order overruling the said motion being as follows:

In re THE EXTENSION OF ELEVENTH STREET. No. 556.

Upon consideration of the motion to strike out the supplemental petition filed in this cause on the 9th day of August, 1904 and the Court being of the opinion that the filing of said petition will not prejudice the rights of the property owners as to any defense they may desire to interpose, more so than if a new action had been instituted, and reserving to them the right to interpose such defense as they could have, had the suit been begun anew; it is this 9th day of March, 1906 ordered that said motion be, and the same is hereby overruled.

68 From which order the petitioners appealed to the Court of Appeals.

Whereupon the Appellant filed and interposed the following plea:

In re EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

Now comes the Columbia Heights Realty Company, owner of Lots one to nine inclusive, and lots twenty to thirty both inclusive, in Block twenty-seven and all of Block twenty-eight.

And for plea to the supplemental petition filed in this cause on the 9th day of August, 1904, says that the cause or right of action in said petition set forth did not accrue within three years next before the filing of this suit or supplemental petition and this respondent pleads the same in bar to any recovery herein.

Now comes the Columbia Heights Realty Company, a corporation, and for further plea to the supplemental petition or new action in this cause, says, that at a former trial for the condemnation of the right of way for the extension of Eleventh Street, from Florida Avenue to Lydecker Avenue, the jury in said cause found that the remaining parts of Lots 1 and 30 in Block 27, and Lots 1 and 16 in Block 28 and the land adjoining said lots would be damaged by the opening of the said street; and said verdict was finally confirmed and judgment entered upon the same; that therefore, the issue as to whether or not said lots were benefited by the extension of the said street has been adjudicated and settled. And inasmuch as this respondent is the grantee of and claims under the devisees and heirs at law of the persons who were parties to said proceeding and then the owners of said land, and the petitioners in this case are the same as in said former proceeding, and therefore they
69 are estopped to claim that said pieces or parcels of land are in any way benefited by the opening of the said street, and they therefore plead said judgment in bar of the right to levy any assessments against said pieces or parcels of land on account of the extension and opening of the said street in this case.

And thereupon the following notice was sent by the Deputy Marshal of the District of Columbia to the men summoned as jurors.

UNITED STATES MARSHAL'S OFFICE,
WASHINGTON, D. C., *Feb.* 9, 1906.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. District Court, No. 665.

Pursuant to an order of the Supreme Court of the District of Columbia made today in the above entitled case you are hereby summoned as one of jury of seven judicious, disinterested men, not related to any person interested in these proceedings, and not in the service or employment of the District of Columbia or of the United States, to be impaneled and sworn by the court on the 16th day of February A. D. 1906, at ten o'clock A. M. to re-assess the benefits resulting from the extension of Eleventh Street in accordance with the provisions of an act of Congress approved June 6, A. D. 1900, entitled "An Act for the extension of Columbia Road east of 13th Street and for other purposes."

Very respectfully,

AULICK PALMER,
U. S. Marshal.

R.

70 And thereupon the following order was passed:

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court.

The Marshal having summoned John E. Herrell, William A. H. Church, William V. Cox, James F. Oyster, Daniel Fraser, Edward Graves and John H. Nolan as a jury herein, as directed by an order heretofore passed herein, and the Court having accepted said jury as qualified, and having administered to them an oath in accordance with the provisions of an Act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia Road East of Thirteenth Street, and for other purposes," it is by the Court this 16th day of February A. D. 1906, ordered, That said jury view and examine the land which has been effected by the proceedings herein, and thereafter, at 2 o'clock P. M., on the 28th day of March 1906, and from time to time as they may determine, by adjournment, they shall, in the United States Court House, without the presence of the Court, hear and receive such evidence as may be offered or submitted to them on behalf of the District of Columbia and by any person or persons having any interest in these proceedings, touching the benefits and advantages which have accrued to property by reason of the extension of Eleventh Street, Northwest, on a straight extension of the lines thereof, with a width of ninety feet, from Florida Avenue to Harvard Street, and thence, with the same width and on
71 a straight line to *to* Lydecker Avenue, joining said avenue with its center line opposite the center line of Eslin Avenue in the District of Columbia; and when said hearing is concluded said jury or a majority of them shall proceed to assess said benefits and return to the Court, in writing, their verdict setting forth the lots, pieces or parcels of land which have been benefited by the extension of the said street as aforesaid and the amounts of the assessments for such benefits against the same, in accordance with the provisions of the aforesaid Act of Congress approved June 6th, 1900.

By the Court,

JOB BARNARD, *Justice.*

At the time the above order was passed Counsel was not present and had no notice that such order would be passed other than the following notice:

Leo Simmons *et al.,* Attorneys for Respondent:

Please take notice, That the United States Marshal for the District of Columbia, by order of the Court, has summoned John E. Herrell, William A. H. Church, William V. Cox, James F. Oyster, Daniel Fraser, Edward Graves, and John H. Nolan, as a jury, to re-assess the benefits resulting from the extension of Eleventh Street, North-

west, in accordance with the provisions of the Act of Congress approved June 6, 1900, A. D., entitled "An Act for the extension of Columbia Road east of Thirteenth Street, and for other purposes;"
and that the Court (Mr. Justice Barnard) will be required
72 to impanel and swear said jury at 10 o'clock A. M., on the 16th day of March A. D. 1906, in Criminal Court No. 2.

On the 16th day of March, 1906, William A. H. Church, James F. Oyster, Edward Graves, W. V. Cox, Daniel Fraser, John H. Nolan, and John E. Herrell, purporting to have been summoned as aforesaid appeared in said Court and without having first examined said men or anyone or either of them as to the qualifications prescribed by the said act of June 6, 1900, the Court administered the oath to said men that they would "assess the benefits accruing to the property abutting or adjacent to 11th Street extended according to the Statute."

After said jury was so sworn, the Court not having done so, counsel for the Appellant undertook to examine said jury as to their qualifications, but the Court refused to permit counsel to ask them any question at all, because no questions were suggested before they were sworn, to which ruling the appellant excepted.

And thereupon the Commissioners of the District of Columbia, through their Counsel, prayed the Court to instruct the jury as follows:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh Street, Northwest, as extended from Florida Avenue to Lydecker Avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from said extension of said Eleventh Street. By *extension of the street the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare, or highway.*"

To the granting of which instructions the Appellant objected,
upon the ground that the "extension" could not mean the
73 completion of the street for all the ordinary purposes of an public thoroughfare or highway," and upon the further ground that the jury had not right to assess any benefits beyond the line of 200 ft. from the Street to be opened. Said objections were overruled and the Appellant excepted.

And thereupon the Court further instructed the jury as follows:

The jury are instructed that in ascertaining whether any benefit has accrued to any piece or parcel of land abutting upon or within the vicinity of Eleventh Street extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of said street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto, the jury

must find that the benefits upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by extension of car line in said Street.

No. 2. The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case, unless they find the property so assessed actually benefitted by enhancement in value and that such benefit accrued immediately from the extension of the street in question.

No. 3. And in establishing such benefits, in case they shall find any, they shall take into consideration the damage done to any piece or parcel of land abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find any piece or parcel of land benefited
74 by laying out and opening of said street, and shall also find that by reason of the grade of said street being fixed at a point must below the level of such ground, and that such ground by reason thereof is left far above the said street grade, so as to cause damage on account of grading same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accruing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits, and the damages caused by change of grade in extension of said street, the jury should take into the amount allowed, if any, for damages by reason of such change of grade, by the former jury which assessed damages.

No. 4. The jury are instructed that they are not at liberty to levy any assesment against any piece or parcel of land abutting upon or adjacent to said Eleventh Street, unless they find such piece or parcel of land benefitted by actual enhancement in value immediately upon the opening and extension of said street and in considering whether or not any piece or parcel of land has enhanced in value, they have no right to consider any enhancement or increase in value that is the result of any special improvement made upon the street after it was opened and established, *as previously stated*, neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh Street.

75 And thereupon the appellant prayed the Court to instruct the jury as follows:

1. The jury are instructed that in ascertaining whether or not any benefit has accrued to any piece of land abutting upon Eleventh Street extended, or in the vicinity thereof, they shall not take into consideration any benefit which they may find had accrued to such land subsequent to the laying out and establishing of said street. That is to say, that in levying assessments for benefits, if the jury shall find any, they shall not take into consideration the grading or paving of the street, nor any improvements or street car facilities thereon subsequent to the laying out of the street, In other words, the jury must find that the benefit upon which an assessments was based, was the direct result of laying out and establishing the street,

and not the result of improvements since made, either in or upon the street itself, or abutting nearby lands.

Said jury is further instructed that

2. Such special improvements as water-mains, sewers, curbs, gutters, and sidewalks are usually assessed in other proceedings, and of course, any enhancement in value arising from that character of improvement and the macadamizing of the street in question, or any street crossing same should not be taken into consideration as a basis of benefit in this case.

3. The said jury is further instructed that in estimating what benefits, if any, have accrued to any piece or parcel of land abutting upon or adjacent to said Eleventh Street, they are not at liberty to take into consideration any enhancement in value or benefit that has been given or accrued to such land by the grading of such street nor macadamizing the roadway of same; nor have they the right to base their assessment for benefit upon any enhancement in value, if they find any, brought about by the laying of sidewalks, sewers, water-mains, gutters and curbs, that have been placed in or upon said street; their sole right to levy an assessment against any piece or parcel of land must be founded upon such benefits, if any, as have accrued to the land from the extension of the street only. And what is meant by extension is the condemnation of the land for public uses and locating said street by demarcations and boundaries and placing same upon the maps and plans of the District of
76 Columbia, as a public highway.

4. The jury is instructed that what is meant by "benefits," is not such benefits as accrue to the public generally; but such benefits as will actually enhance the value of the property; and if from the evidence they find that any piece or parcel of land abutting upon said street or adjacent thereto has depreciated in value since the extension of said street, instead of enhancing it or increasing it in value, then they are not at liberty to levy any assessment against same.

5. The jurymen are further instructed that the burden is upon the petitioners, the Commissioners of the District of Columbia, to satisfy you that any piece or parcel of land has in fact been benefited by enhancement in value from the extension of said street. That every presumption of law growing out of their proceeding should be resolved in favor of the person whose land is liable to assessment. And therefore if any doubt should be met with, caused by reason of delay in prosecuting these proceedings, as to whether or not any piece or parcel of land was in fact benefited by the extension of said street and at the time it was extended, such doubt should be resolved in favor of such property owner and against the District of Columbia.

But the Court overruled and refused to give said instructions to the jury and the Appellant by its Counsel separately excepted to the overruling of each instruction.

And thereupon Counsel for the Appellant soon after said jury was sworn, being informed that said jury had not been summoned and impaneled as required by law, filed a motion in said case praying

the Court to discharge the said jury which motion is in the following words:

In re EXTENSION OF 11TH STREET, N. W. District Case No. 556.

"Now comes the parties represented of record by attorney, Leo Simmons, and moves the court to discharge the jury from any further proceeding in the case, because said jury is illegally constituted, that the members of said jury were not selected and summoned as required by the law under which these proceedings
77 are had."

This motion was overruled by the Court on the 31st day of March, 1906, and the Appellant excepted. The following, purporting to be the substance of the evidence before the Jury, which evidence was presented in Court in the form of an affidavit by the stenographer, after the verdict was returned and exceptions being heard.

H. E. DOYLE, a witness on behalf of the District of Columbia, testified in substance in relation to Blocks 27 and 28, that he is employed by Thomas J. Fisher & Company, in charge of the sales department, and has been so employed for 12 or 13 years, has been called as a witness in condemnation cases very often for the last 2 or 3 years.

Q. In the conduct of your business have you become acquainted with the property between Florida Avenue and Lydecker Avenue, in the vicinity of 11th Street? A. I think the extension of 11th Street, has been a great benefit, both to the property above Lydecker Avenue and the property below Florida Avenue. I think benefits extend from Sherman Avenue to 13th Street, except corner lots of 13th Street. Thirteenth Street and the cross streets, and the small ordinary size lots, short lots would perhaps not be benefited. 150 feet lots as most of them are on 13th Street. The East end of the lots probably ¾ of the lots are benefited. The lots from Florida Avenue to Clifton Street were worth $.25 per foot before the street was opened and are worth now about $.40 to $.50 a foot, that is the lots immediately abutting on the street. Lots immediately abutting on 11th Street from Florida Ave. to Clifton were benefited 100 per cent. for an ordinary depth of from 85 to 100 feet.

Q. How far from 11th Street on the West do you say they were benefited 100 per cent.? A. Just one lot. I should say, the
78 others were benefited probably 5 cents per foot. The lots between Whitney Avenue and Lydecker Avenue are benefited 100 per cent.

Cross-examination:

Said witness testified: Don't know absolutely how long I have lived out there. Don't have to live out there to go there, can't say when first saw the property. Fisher & Company subdivided Columbia Heights. Afterwards admitted that this was incorrect, Fisher & Company had nothing to do with that subdivision, that John Sher-

man subdivided the land. There are not a great many houses built on Blocks 27 and 28, some frame shacks. Don't believe there ever was any house near Florida Avenue on Blocks 27 and 28 except Mrs. Logan's, corner 13th Street. Did not make the statement in the first place that the Florida ave. ground was benefited 50 per cent. Only the property fronting on 11th Street. Florida Avenue frontage is not much benefited, it is not much good now and never was.

Q. Assuming the fact that the land was worth $.70 to $.80 per foot, referring to lots 1 and 16 in Block 28 and you say that they would be worth from $.40 to $.50 per foot now, how do you reconcile that with the statement that the land is benefited? A. Would not reconcile it with the fact that the land was ever worth eighty cents a foot. Nobody that knows anything about it would say that.

Q. Assuming that the witness for the District of Columbia when condemning the land testified that it was worth from $.65 to $.80 per foot and that was accepted as the value of the same, and now you say it is only worth $.40 per foot, how do you account
79 for the claim that it was benefited? A. I would say that the man who made that statement did not know what he was talking about. I have not bought, sold or owned any lots in the neighborhood. I have assumed all the lots in Blocks 27 and 28 to be on grade. I understand that the lots are to be carried down to the grade of 11th Street. I understand that I am to consider that this property is on grade, I was told by Mr. Sinclair to consider it on grade when testifying. Of course I would not feel that I was much benefited if I was left up in the air, I feel they should allow me something for the grade, but they would have had to cut it down any way to get the money out of the property. I don't think it, the land along 11th Street has depreciated in four or five years; it has depreciated in 10 years. I think it is now the same value it was for the last five years. I was told by Mr. Sinclair that I need not take into consideration the grading of Blocks 27 and 28, because the District had allowed the owners of said land a sufficient amount to grade the same down to the grade of 11th Street.

Q. Have you been able to free your mind from the fact that improvements have been made and the street car line was run out there since the street was opened? A. I have tried to free my mind, but I admit it is a hard thing to do. I would say that the lots along Florida Avenue exclusive of the corner lots, Lot 1 in Block 28, was not benefited at all.

Q. Would not this property, referring to Block 28 have been better residence property, elevated as it was and left on a smooth level street, than it is cut down and opened in this section below (referring to the section below Florida Avenue)? Would it
80 not have sold for more? A. I think it would, although to-day it would not sell as well as ten years ago.

Q. It would have sold for more if it were left as it was and this street cut through with these streets kept at the original height? A. I think it would.

CONRAD DODGE.

And thereupon CONRAD DODGE, a witness for the Government testified in substance in relation to Blocks 27 and 28.

Cross-examination:

Q. I want you to look at that property in Block 28 and tell what you think that property would be worth if the street had been made there if it had not been cut down. A. That is the question I was thinking of. The fact of that street being there and this street not being cut down at all and Clifton Street being cut through, it would be worth a good deal more money than it is today.

Q. What do you say it would be worth? A. I would say it would be worth $1.00 a foot, that is if the street had never been graded, that is if they ran 11th Street and cut the street like 13th Street, and if the street had not been cut down. As it is now graded I think it would be worth $.50. If the street had been run on the grade it would be worth much more than it is now, the whole property where you overlooked the town.

Q. If the property had been placed on the market and sold for much less than it did before the street was opened, you can't say it enhanced in value? A. It would depend entirely upon the financial condition of the owner.

81 COMMISSIONER:

Q. Let me ask you a question or two. In Block 28 you say ground on the hill was worth $1.00 a foot before it was cut through? A. I said if 11th Street was cut through and not graded down, and the original grade was kept and he had access there and there was left a little terrace that ground would be worth more than it is today.

Q. What is it worth now? A. I put it at $.50.

Q. What would it be worth after it was graded? A. After the hill was cut down I said about $.50, that is the price I put on it yesterday, they are cutting it in here now.

MR. SINCLAIR:

Q. You said a while ago, as I said before if 11th Street had been extended and the grade retained as it existed before the extension was made, the upper part of this property (referring to Block 28) would be worth $1.00 a foot? A. Yes, it would be worth $1.00 a foot because you would have views from it all over town. I say that the way 11th Street is cut, if it had gone over the hill on its original grade, without cutting it down it would not have damaged the property. As I understand they the District of Columbia paid the money to grade the property.

Witness testified further that he never bought, sold or owned a piece of property in said section.

W. A. J. HOPKINS.

And thereupon W. A. J. HOPKINS testified on behalf of the District of Columbia in relation to Blocks 27 and 28 as follows:

Q. Mr. Hopkins look at this plat and tell your opinion
82 of the value of the porperty lying between Florida Avenue and Roanoke Street before 11th Street was extended. A. Twenty-five cents a foot.

Q. What is the value of the land now? A. At the South end I put it at $.60, from Clifton Street to Florida Avenue $.50, from Clifton to Roanoke Street $.65.

Cross-examination:

A. I was away from the city from 1902 to 1906. I am in the office of L. D. Wine & Company, Mr. Dodge is in the same office. Saw this property about twenty-five years ago, it was then a commons. In 1900 the street had not been cut through, there was nothing more than a roadway running up 11th Street. It was cut through when I returned to the City. What I mean by commons, it was just open with trees standing on it and I am positive there was no improvements whatever east of the line of 11th Street other than the Garfield Hospital.

On being shown two large residences built on the Schnieder Estate, which was located at the top of the hill and just East of Block 28, said he *never* recollect of seeing them in his life, although it was admitted by the District that said houses had remained there until a few years ago when they were torn down on account of the embankment left in cutting the street through, falling in.

A. I only *road* up the street in the cars and did not ex*ma*ine the land. I did walk over it about 3 years ago. I would say that if the lowest estimate placed upon Lot 16 in Block 28 by the Governemnt experts at the time the land was condemned in 1899 and 1900, was seventy cents a foot, that they did not know their business.

Q. Do you take into consideration that this land in Blocks 27 and 28 was left 28 feet above grade by cutting the street
83 through? A. I was told that I need not consider the grade that the government had allowed sufficient money to pay for grading the whole square.

Witness said he had been subpœn-ed to come to testify.

Q. Mr. Hopkins have you ever made a sale in that neighborhood? A. Not in recent years, can't tell how far back. Don't know that I ever made a sale.

Q. Do you think you are competent to swear away peoples' right without having made a sale. A. I do.

Q. Do you think you would be competent to certify as to values in a place where you had never made a sale? A. I say under these conditions, Yes.

Q. Taking into consideration those improvements and the car line, how much has the property been benefited? A. Some 50%, some more some less.

Q. You do not think the car line and the improvements have

anything to do with it at all? A. Of course they have but I can't tell what percentage.

Q. Are you an expert on real estate values and improvements? A. I never claimed to be an expert. I will simply refer you to my subpœna for the reason of my being here.

Q. What would be the market value without the car line and without the improvements which have been made there? A. I don't know.

Q. You could not give the present market value of the
84 ground without the car line and without the improvements that have been made there? A. I don't think a living man could.

Q. The fact that money had been expended in the building of houses and improving the property does that not naturally increase the market value? A. It does. I can't tell the market value without taking into consideration the car line and other improvements. I can guess.

WILLIAM SIMMS,

And thereupon Mr. WILLIAM SIMMS was called as a witness for the District of Columbia and testified in substance in relation to Blocks 27 and 28, that he had been in the real Estate business twelve years.

Mr. SINCLAIR:

Q. Are you acquainted with the Columbia Heights property? A. I think I am.

Q. Have you at my request considered the question as to what effect the opening of 11th Street from Florida Avenue to Lydecker Avenue has had upon the property through which the extension is made? A. I want to tell in my answer what I have reference to in replying to this question. My statement was going to be, that I would give my views of the 11th Street extension. The benefits to me seem to be reasonable and at the same time I would state that Mr. Sinclair asked me what I thought about it, I told him as I told you that I would state what I thought about it. I would say that the ground from Florida Avenue to Roanoke Street was worth before the extension from $.25 to $.30 in my opinion and now it is
85 worth about $.50. In my opinion the *the* benefits to cross streets is comparatively small. I would not say that it reached more than 100 feet West and 150 feet East. I would state this in my transactions in the last five or six years I have not made a sale in that section at all. Before the street was opened the land was worth from $.35 to $.40 vacant lots from Roanoke. Do not know of any recent transaction out there.

Cross-examination:

Said witness testified:

A. I would not consider the property in Blocks 27 and 28 acreage property. It was all subdivided and has been for a great many years, though it had woods on it, large oaks, I could see that for my

own self by looking at it. I first saw the property in 1902 and haven't paid any special attention to it since then. I do not think any lots have enhanced in value except those directly fronting on 11th Street. Don't know anything about the lots before the streets were opened, only what has been given me through other agents. Never sold any in the subdivision. I have neither sold or made a loan on any property in the section. The only property I can remember handling anywhere in the neighborhood and did not sell that, was Lot 8, Block 16, Todd and Brown's subdivision, given to me by another agent. I have no property for sale in the section now.

WILLIAM R. RICHARDS.

And thereupon WILLIAM R. RICHARDS the surveyor of the District of Columbia produced and offered in evidence a blue print tracing and map showing various outlines of the lots at the present time to-wit, April 16, 1906, between 7th and 14th Streets, Florida Avenue and Spring Road, as they exist today.

Cross-examination:

86 Said witness was shown Exhibits, marked A. and B, indicating one large frame house, one large brick that stood before the street was extended, just east of the line of 11th Street, and just South of the line of Clifton. This evidence was offered for the purpose of showing that the witness who was testifying for the government knew nothing about the land before the street was opened. As they said they knew nothing about the houses being upon said land.

Said Richards recognized both houses and located them as being upon the land before the street was opened as described. Said witness further testified that the cut at Clifton and 11th Street was 38 feet. Clifton Street prior to that time had not been graded, but was then on the level with 13th and Clifton Streets; that the parking all along the line of 11th Street, that is a strip of part of the street proper, about twenty feet on each side, was left for the property owners to grade; that prior to 1900 houses had been built extended down several hundred feet from 13th Street and were on grade before the extension of said street. There is 30 feet reservation on all of the stre-ts in Columbia Heights. "A note to that effect is in the subdivision made by John Sherman.

That since June 6, 1900 all the cross streets in said Columbia Heights had been graded and improved; the road beds were graded and macadamized; curbs, sidewalks, and gutters had been put in; sewers and water mains had been laid. That said 11th Street was graded and cut, under the District Appropriation Act of 1901 and had been macadamized under the District Appropriation Act of 1902. The car line was extended and put into operation on said 11th Street in the fall of 1903. That since said street was cut through it had been macadamized as I said under the Appropriation Act of 1902, and improved with sewer mains and water

87 mains etc. That a greater portion of it including the west side abutting Lots 27 and 28 from Florida Avenue to Roan-

oke Street had been improved with curbs, gutters, sidewalks. That the great steep cut that was made at the head of Clifton Street and 11th Street was necessary for the car line and to give an easy travel to the public.

THOMAS W. SMITH.

And thereupon THOMAS W. SMITH a witness in behalf of the District of Columbia testified in substance in relation to Blocks 27 and 28; that he was a lumber dealer.

A. Have had general experience in doing all kinds of business in real estate, buying and selling it. Have given testimony on behalf of the District before the various land Commissioners in regard to benefits but they did not regard my testimony. Have known the property from Florida Avenue along 11th Street for about 30 years. I have driven up Sherman Avenue many times years ago. I am slightly interested, want to say to my detriment financially in reference to a small lot of ground on 11th Street. I purchased two houses when the Galloway people gave up the property and it was sold under trust, Block 14, part of Lots 8 and 9. It is now sub l ts 48 and 53. I think the property bounded on Bismark, that property is benefied from Florida Avenue to Bismark Street thirty cents a foot. About eighty feet on each side.

Q. What in your opinion was the land worth, between Florida Avenue and Roanoke Street, before the extension of 11th Street, in 1899. A. I do not believe I was well acquainted with values at that time at that point.

By Mr. SINCLAIR:

Q. Give us your idea about that. A. I started at eighty
88 feet and reduced it to 2/3 of the distance to nothing. I think the cutting down and opening of the street was the proper way to develop Block 28. I don't think the outlook from the hill at 13th and Clifton Streets would benefit the property. Don't think it would be worth more up on the hill on account of the outlook from such a noisome place, if one wanted to get away. I refer to part of the side right below Florida Avenue and along the line of 11th Street.

Cross-examination:

Q. Do you think the cutting down of this street (referring to 11th Street) leaving the land thirty-five feet above the grade would be of benefit. A. No, that would not be of benefit but the land was benefited by the opening of the street.

Q. If the grade had not been changed? A. The people who owned the property ought to have fair knowledge that they would be in the air, and would have to dig their land down when that street was opened to the public use. As I understand 11th Street is cut down to the level of the slums. Let me make myself clear. Any person buying that property (referring to Block 28) seeing its height above grade, and knew positively that 11th Street had to be extended, bought that with incomb-us on it, which practically would

be — mortgage on it, of the cost of reducing that land to the level, where houses could be built and he knew he was buying land which was reduced in value that much. That street had to go through that way.

Q. Would not that apply to 12th Street? A. If you opened up 12th Street it would.

89 Said witness further testified, that the new house referred to as having been bought, by him in 1903 at the corner of Harvard and 11th Streets cost him including the land $500.00 less than it cost the builder to build the house; that said house was built to sell for $6500.00 and he bought it for $4900.00, after the street was opened and before the car line was built. After the car line was built he sold the property for $6000.00.

And thereupon Counsel for the Appellant moved to strike out all the evidence in relation to Blocks 27 and 28 given by the witness, Thomas W. Smith on the grounds that he knew nothing about the property before the street was opened and was incompetent to testify in relation to the same. Said jury refused to strike out said evidence and the Appellant excepted.

P. J. WALSH.

And thereupon the District called as witness P. J. WALSH who testified in substance in relation to Blocks 27 and 28, that he had been engaged in the real estate business for about 6 years. He knew generally about the property from Florida Avenue to Lydecker Avenue along 11th Street. Owned a piece of property around on Morgan Avenue where 10th Street is now, about four squares North of 11th Street. Never owned any other property nor bought or sold any other property in the neighborhood of 11th Street other than the lot on Morgan Avenue.

Q. To what extent in your judgment, was the property lying between Florida Avenue and Roanoke Street benefited by the extension? A. Do I have to take into consideration the cutting

90 of the banks?

Mr. SIMMONS: Yes, you have to

Mr. SINCLAIR: Not in view of the fact that you have been awarded money to come down out of the air.

Mr. SIMMONS: I submit that this is not fair.

A. Leaving the grade out of consideration, this property would be benefited. If I take it, suppose it was on a level, if it was brought to grade, this property would be benefited, that is the inside lots, the lots say from Corner and intersecting streets, I would say almost double. I would include it as far as Roanoke Street and Block 27.

Cross-examination:

Said witness testified in substance that he was asked to testify by the Attorney for the District and went along the street to get values from people and ask people who bought property along the street recently and what they paid for the property. Have not

bought any property recently in the neighborhood, not in the last five years.

On being asked if the property in Blocks 27 and 28 had been left on its original grade as at 13th and Clifton Streets, would it not have been more valuable than being cut down?

Witness replied. A. I suppose a residence up there naturally would be better than it would be under those circumstances. Property would be more valuable up there than it would be after it was cut down.

Q. It would be more valuable than it would be, if it was cut down to the grade of 11th Street? A. Yes. The land at 13th Street and Clifton Street it is much more valuable than the land at 13th
91 and Florida Avenue. Higher ground is always more valuable.

FULTON R. GORDON.

And thereupon FULTON R. GORDON, witness on behalf of the District of Columbia, testified that he had been engaged in a Real Estate Business, subdividing and selling vacant lots in the outline of the suburbs of Washington for the past ten years. That he knew about the situation of the property abutting upon 11th Street extended and adjacent thereto. That the property from Florida Avenue to Clifton Street in his opinion was benefited to the extent of from 75% to 100% by the extension of 11th Street.

Cross-examination:

Said witness said:

Q. So you think this ground here (referring to Block 27 and 28) thirty-five feet above the grade you say that is benefited?

Mr. SINCLAIR, for the petitioners: "Included in that question is the fact that you are to take into consideration that you (the owners) have had awarded damages to come down to grade. You will have to deal with the property as down to the grade, and you have collected from the District the money to come down."

To which remarks counsel for the Appellant excepted.

Q. I asked you to assume that, that lot (referring to Lot 16, Block 28) is thirty-five feet above grade. A. I understand the Government paid for grading all of those lots.

Q. Who told you so? A. Mr. Sinclair: I don't know
92 when it was. It was several days ago, that the government made an appropriation for the grading of those lots.

Mr. SINCLAIR: I don't misrepresent it.

Q. Suppose Mr. Sinclair told you something that was not so, what would you say about it then? A. I do not think that is a proper question.

The CHAIRMAN: Let us get down to the facts.

A. I do not want to impose on the jury.

Mr. SIMMONS: I want to know what knowledge you have about

these things. Do you know what it would cost to grade that piece of land (referring to Lot 16, in Block 28). This rough street and no improvements.

A. No Sir.

Q. Now take this property and tell us how much in your opinion it had enhanced in value on the day the street was cut through and left high? (referring to Block 28) assuming that it was 38 feet above grade; this rough street and no improvements. A. It is improved now.

Q. Eliminate the improvements from it.

Mr. SINCLAIR: The Court said a completed street.

The CHAIRMAN OF THE JURY: I think the court meant there, and what I will continue to consider the condition of that street as it is to-day, leaving out the railroad. That is what the court meant there.

Q. Without the car line and without the improvements what do you say the property is worth? A. The improvements are there and I have to take them into consideration.

Q. I believe you say you never sold a lot out there (referring to the section of Columbia Heights). A. Well, I dealt in one lot myself, it was years ago. Ten years ago probably. That is the only transaction I had out there. My transactions have been far beyond Columbia Heights and Holmead Manor.

Q. Were you dealing in this section in 1900? A. No I could not *sight* a single case of any land sold out there in either the cross streets or 11th Street.

93 Q. Would your estimate of the amount of benefits be influenced in any way by the height of these lots (referring to Block- 27 and 28) above the grade of 11th Street? A. Yes, that is its effect, if it is way above grade. A little bit above does not hurt.

Q. How much of grade would you regard as sufficient to depreciate the value? A. I think a house would look very nice on a five foot terrace. After you get beyond that I think it is a reduction.

Q. You did not give us the value of those lots in Blocks 28. What were Lots 1 and 16 worth before the opening and afterwards? A. The two lots are worth $.50 now. They were worth about $.35 before.

Q. Now is it not a fact that whatever improvements have gone in there, have gone in there within the last three years, since the car line was either actually constructed or assured? A. I think most of the improvements have gone in there in the last three years.

Q. You don't claim to have any special knowledge in regard to values (in this section)? A. Except in a general way. I have made no inquiry about sales in that neighborhood.

Q. You don't know of a sale in the last five years? A. I did not ask for one.

Q. And the only transaction you had out there or about which you know anything is that lot you traded so long ago that you do not know when it was? A. I do not know.

94 Q. Haven't your dealings in real estate been confined to subdivision of ground through which streets were run? A. You mean in which no streets were at the time?

Q. Yes. A Yes, my business is buying up ground and putting streets through it.

Q. Out in the Country? A. Out beyond.

Q. Buying farms and turning them into city lots? A. Yes. In such case we usually donate from 25 to 40% and some times more; generally say 25%.

Q. Then, immediately upon the opening of the street your lot must sell for about 40% more than it cost in order for you to get even? A. You have to figure that out.

Q. In other words you give away 40%? A. Yes.

Q. (In making you- estimate) did you not take into consideration that the car line had actually been extended. A. I considered that the street car line was there and it was the only street possible for the car line to go on.

ALLEN B. MALLERY.

And thereupon the District called as a witness ALLEN B. MALLERY, who testified that he had had experience in opening and laying out streets in subdivisions and had been in the real estate business for 15 years, and had formerly testified for the District, in condemnation proceedings, namely: Sixteenth Street, Fourteenth Street, and I think Sherman Avenue, but I am not positive and a number of alley cases.

95 Q. Are you acquainted with the property in the vicinity of 11th Street extension from Florida Avenue to Lydecker Avenue? A. Yes, in a general way. Have been thinking over the question as to the effect of the opening of 11th Street had upon the property through which it run. Property has been benefited. Given a reasonable distance from 11th Street from Florida Avenue I should say it has doubled in value. There is a benefit running all the way to the next street to the lots facing on that street.

Q. What in your opinion was that property worth before the openin*ing* of the street was contemplated on the *Sherman* property? A. Twenty-five cents. All property from Roanoke Street northward has been benefited one hundred per cent. It has benefited the whole section.

Q. Would that *the* property north of Eslin Avenue have been benefited by the extension? A. Yes, I would say it has been benefited as much as this down here (referring to property in Block 28). Haven't taken into consideration the car line.

Cross-examination:

Q. You never owned a piece of property out there? A. Not on that street. The nearest I have been to it is Lot 20 in Block 8, Todd & Brown subdivision and between 14th and 15th Streets, but I have not had any there for a number of years. I disposed of the last piece 7 or 8 years ago before the street was opened.

Q. There was no houses any where around the neighborhood of Block 28. before the street was opened? A. There was a
96 house some where up near 13th Street, I couldn't tell you where; there was no house near Blocks 27 and 28.

Q. Do you not remember seeing any houses there. A. I could not tell you because I do not remember.

Q. You were not acquainted with the neighborhood? A. In a general way.

Q. What do you mean by a general way? A. None of us had need to go through it because the property was not on the market, and when I testified to the value I did it in a general way from the opening of the street and not from the specific nature of that property or what house was here or there.

Q. You don't know anything about the values before the street was opened except from you- opinion now? A. I knew then about $.25.

Q. You say that Lots 1 and 16 in Block 28 were worth twenty cents? A. I say twenty or twenty-two cents.

Q. Would the fact that the government witnesses when the street was being condemned, testify to these lots being worth from sixty to eighty cents and the District Government paid from sixty to eighty cents and did not object to it alter your opinion? A. I would stick to it, what I said.

Q. The other people made a mistake? A. They probably did. I am giving you my opinion.

Q. Would you stick to your opinion against theirs after
97 this lapse of time not knowing anything about the situation of the property? A. I would.

Q. Has the cutting down of that street opposite Blocks 27 and 28 so as to make it a good street for the people, in your opinion any effect on the value of that particular piece of property? A. I would say they were entitled to damages.

Q. It would not be benefited? A. Not if it was left up there, but it would if it was brought down to grade.

Q. You think leaving it (referring to Blocks 27 and 28) in such position that it cost the owners over $50,000 to bring the land down to grade, the grading brought about the cutting down 11th Street, the land would still be benefited? A. I think so.

Q. Still benefited, notwithstanding it would cost them over $50,000 to grade it? A. If they get reimbursed for the damages.

Q. You think all the property is damaged to the extent of cutting it down and grading it? A. Yes.

Mr. SINCLAIR: I want to offer in evidence the finding of the other jury upon the subject of the grade damages; Lot 1, Block 27 $2500; part of Lot 30 Sq. 27 $1469; part of Lot 1, Block 28 $6300; part of Lot 16, Block 27 $6300.

To the offering of which testimony the Appellant's Counsel objected on the ground that it was incompetent for any purpose, other than to show that the former jury had found that the said property was damaged and therefore could not be used excepting for the purpose named.

98 AARON E. MCLAUGHLAN.

And thereupon The District called as a witness AARON E. MCLAUGHLAN, who testified in substance that he had testif-ed for the District of Columbia in a great many cases of street extensions and was asked (by the Corporation Counsel) to look at Blocks 27 and 28 and state whether or not in his opinion said property was benefited by the opening and extension of 11th Street.

Said witness testified that he thought the said property in Block 27 and 28, the land fronting along the line of 11th Street was benefited from 20 to 40% by the reason of the opening and grading of the land down to the Street level; but he could not say that said land was benefited by the extension of the said street if it was left 30 feet in the air by cutting it through.

Cross-examination:

Said witness testified that he had never bought sold, or dealt in any land in the section where 11th St. was cut through; that he did not know the value of the land before the street was cut through or what improvements were surrounding the same.

That the Corporation Counsel had told him before testifying that a sufficient amount of money had been allowed by the District of Columbia for grading said property, and assuming that to be a fact he thought the property would be benefited by the opening of the street and the grading of the land down to its proper level from 20 to 40 per cent., but he could not say that the said land would have been benefited in any way by the extension of the street if it had been left from 18 to 30 ft. in the air by the extension.

99 And thereupon the District of Columbia announced its case closed.

W. B. TURPIN was called on behalf of other property owners, and after testifying in relation to property lying between Columbia Road and Lydecker Avenue, was asked, over the Appellant's objections.

CORPORATION COUNSEL:

Q. What do you say as to the benefits relating to property in Blocks 27 and 28? A. I should say that property had been benefited especially the lots fronting on 11th Street to a considerable extent. As to what extent I would not say. Of course I don't take into consideration the grading of the property. I don't know what it would cost to grade it and in fact I know very little about the property. I have never dealt in any property in that section.

The property not fronting on 11th Street, that is to say the cross streets, would not sell for as much now as it would have before the street was opened.

Q. You say there was no appreciable benefit on the cross streets? A. No.

Witness could not remember but one transaction that he had in the whole of that section and that was some time ago in a lot near

Whitney Avenue. He thought that there was a benefit from 30 to 35% from Florida Avenue up exclusive of the grading.

Q. Do you understand that there is no benefit to Eslin Avenue? A. No sir, I think it ought to be eliminated, of course the car line does, but simply opening the street did not help it a bit. I don't think the opening of the street has helped the lots inside at all. The benefit would not exceed one lot 120 to 130 ft. deep and
100 that is because it would make it a corner lot. I mean that the land where the lots are made corner property would have more advantage.

Q. Do you think the ground between Florida Ave. and Clifton Street was benefited 30%? A. Eliminating the question of grade, I think so. And eliminating the question of grade from Clifton Street on I think it would be benefited 30%. What I mean to say is this that the land that would sell for $.60 before the extension, would bring $.90 now.

Cross-examination.

Mr. SIMMONS:

Said witness said he had often testified for the District of Columbia in condemnation Cases.

Q. Then if it was worth $.50 before the street was cut through and it is not worth $.50 now, how do you figure out the increased value?

Which question was objected to by the corporation counsel and the question ruled out by the Commissioners and the Appellant excepted.

Mr. SINCLAIR:

Q. Let me ask a question as a general proposition, is it your opinion that the opening of the street only benefits the property that is made to front on it as it opened?

To which question the Appellant by its counsel objected but the objection was overruled and the Appellant excepted.

A. That question cannot be answered in a word or two. If that street runs in any particular way or brings any amount of travel or makes it more convenient for use, it does benefit the property in the immediate neighborhood sometimes running as far as two or three blocks away. In this case I don't think that 11th
101 Street was so badly needed to improve the property except that abutting immediately upon it. It leads down into a negro neighborhood and eliminating the car line I don't think it has conferred a bit of benefit on Columbia Heights.

Mr. SINCLAIR:

Q. Would you not say that the people living in this vicinity or in the vicinity of the extension up as far as Bismark or Yale Street, that they going to the city would go down 11" St. in preference to going over to 7th Street or 14th Street? A. I don't think so, Mr. Sinclair, because the other streets are in much better condition than

this was when it was opened. There were no sidewalks there or anything of that sort.

Q. We are talking about benefits under the Court's instruction which have resulted in the establishment and completion of the street; a completed street, open for travel. A street that could be traveled upon, that is the character of a street we are inquiring about. A. But that is not the character of street that actually existed there when the street was opened. The street has been macadamized and improved since it was opened, some of it has no sidewalks today. I think the benefits would extend to all the property in the Sherman tract on account of the opening up of these streets. It would extend all the way up from 13th Street from 30 to 35%. Of course I didn't take into consideration the matter of the grade.

Cross-examination.

Mr. SIMMONS:

Q. Now I want to ask you this question, Did you take into consideration the damage done in reducing the land and bring-
102 ing the land down to the level of that neighborhood, there indicating the level of Florida Avenue. —. ——.

Q. Take the property at Clifton Street, Do you think it is worth any more when brought down to grade than it was worth at the time or before the street was cut through? A. I don't think anything about the estimate of its value.

Q. Suppose the evidence, by people who knew of sales of land in that neighborhood, where it is shown that it would sell for much less after it was cut down than it would before 11th Street was cut through. Would that alter your opinion? A. It would depend a great deal upon the man who gave the testimony. I am only giving my best judgment. Another man's opinion might change mine.

COMMISSIONER:

Q. Have you had any experience in grading? A. Yes, sir, the cost of grading would depend a great deal on the availability of the dumping grounds. I don't know where they dump this ground, I should say though that it would cost at least $.80 per cubic yard to grade that property and it would be a surprise to me to learn that they were having it done for as low as $.48.

I think as I said, that I don't believe the property along Holmead Manor, Whitney Avenue property was benefited at all, because of the opening of 11th Street did not improve that property one bit. People could get fown Whitney ave. either way they wanted to and did not depend upon 11th Street.

Q. You said this property here at Whitney Ave. had an outlet to 14th Street and was not benefited for that reason. Was not the property on Clifton Street similarly situated and could not the parties go down to 14th Street just as well? A. Clifton Street
103 was not a thoroughfare and I doubt whether a single man in this Commission has ever been on Clifton Street East of 13th Street. The thoroughfare was not open for travel at both ends.

Q. Before the street was opened what price would you put upon it? A. I don't know.

Q. You do not know what it was worth after the street was cut through either? A. Nobody could put a price upon that property the way it stands now, no reasonable man.

And thereupon Counsel for the Appellant moved to strike out all the evidence of the said witness as applying to Block- 27 and 28 on the grounds that the witness had no knowledge of the value of the said land either before the street was opened or after and had shown himself wholly incompetent to testify in relation thereto. But the motion to strike out was refused and the Appellant excepted.

M. A. BALLINGER.

And thereupon the Appellant called as a witness MADISON A. BALLINGER, who testified in substance that he had been engaged in the real estate — from 1885 to 1901. That he testified in the proceedings for the condemnation of 11th Street and was called on behalf of the District of Columbia to prove the value of the land proposed to be taken for the extension of 11th Street. That he talked with a representative of the District, whether he was the attorney for the District or not he could not say; but it was some person representing himself as coming from the District Government in
104 prosecuting the opening of 11th —. He made a thorough examination of the property at the time and was well acquainted with the section, having lived in the neighborhood and dealt in the property in said section prior to the opening of the street and up to 1901. That at the time he testified he placed Lot 30 in Block 27 at $.65 to $.70 per foot and Lot 1 Block 27, $.65 to $.70 per foot, Lot 16 in Block 28 from $.80 to $.90 per foot, Lot 1, Block 28 from $.70 to $.80 per foot. That he knew the value of Lots 6 and 7 in Block 26 and his estimates of the value of these lots were based on his knowledge of the lots in the neighborhood at the time and cash offers that had been made for the same. Lot- 5 and 6 in Block 26 were worth at the time about $.70 per foot as he knew that, that price $.70 per foot had been offered and declined in the year 1899. For Lot 10 in Block 28 he was offered as agent for the owners $1.60 per sq. ft., and that was declined. The time that these offers were made was early in the year of 1900 and he was very familiar with the value of the land at that time. That the offers of $1.60 per foot for Lot 10 were repeatedly made and the owner of the property declined it.

Q. Tell us what effect the opening of 11th St. had upon the property in Block- 27 and 28, assuming that it had to be cut down 38 feet and that Clifton street had to be brought down to its grade? A. It lessened its value. I think that every single inch of ground that was taken off the surface of the earth there (referring to said Block- 27 and 28) lowering the street that much diminished the value of the property adjacent to it; just in proportion as the street was cut through it destroyed the value. How far that reached

would depend upon how far you would have cut back in that square to cut it down to the grade and the condition by the grade
105 of the street. I look on that property as the choicest property in Washington. I knew nothing comparable to it as it stood. It was commanding in its position, and had upon it a great many beautiful trees; it was the most commanding magnificent place in the District of Columbia and the cutting down of that street if that renders necessary the cutting down of the property necessitated destroying the value of the property in my estimation very greatly. I mean the extension of 11th Street. If you had to cut down 30 to 38 feet.

Cross-examination.

By THE ATTORNEY FOR THE DISTRICT:

Q. You based your estimate, Mr. Ballinger, of the value of this property before it was cut down on the fact that in your judgment the Creator of the Universe would not be in accord with such propositions? A. No sir, I do not base it on anything of the kind, I base on the fact that that property was almost the most commanding of any property, if not the most, commanding of any property in the District of Columbia. You could stand upon that property and see the trees at Mt. Vernon; you could see Fort Meyer, Alexandria and the hills in every direction. It was the most commanding and beautiful piece of property that I know anything about. I say the cutting down of that street there damaged the property by reason of making it inaccessible and if that property had to be cut down to bring it down to grade it damaged it in that way. It could have been used, by putting the street through the center of it, as the owners will yet have to do; very accessibly without 11th Street and could have been done with great profit to the owners. The
106 owner of the same could have extended the street down the hill to connect with 11th Street if he desired and that would have been on a grade with the surface of the earth.

Q. As to Lot 30 in Block 27 you put the value of that at $.65 per foot? A. Yes.

Q. Have you any other reason for that idea than the reason you gave just a minute ago about the Creator, fixing that value at $.65 or $.70 a foot? A. Yes, I was actually engaged in the real estate business at that time and living within a square of the property.

Q. Was there any property in that neighborhood sold for that figure, Do you know? A. I do not think any property was sold for that but offers were made and declined. I know of two lots Mr. Jeffries bought in Block 26, which is directly opposite Block 27 and he paid $.65 or $.70 per foot for it before the street was opened.

Q. You say that you testified in this case when the condemnation proceedings were pending before? A. Yes sir.

Q. Are you sure that you testified at that time that this property was worth the same as you say it is now? A. I am pretty sure of it for a number of reasons. I think that is right, I am pretty sure of it. I am quite sure that it is just about what the testimony was.

Q. And your testimony is now based on your recollection of what you testified to? A. No sir, it is based upon what I know personally. Senator Sherman said to me after learning that I had testified that he thought I had put the property too low in the
107 two squares. I feel so today about it and the jury in their written decision adopted my estimate.

To which estimate Counsel for the petitioners objected.

Witness continuing said, he asked me: * * *

"How do you recollect it now and I said that is your finding in connection with my testimony.

Mr. SINCLAIR: Do not say anything about the other commission, if you refer to the other jury.

A. Yes, that is what I mean.

Q. That, of course will be improper.

The CHAIRMAN OF THE JURY: We are not supposed to know what they did.

WITNESS: You asked me how I remembered it and it has relation to their finding.

Q. Referring to Square 28, you testified as to the estimate you fixed as the value of the property, before the street was cut through. A. I think the upper part of it was worth from $.75 to $.80 and $.90 and the property below I do not think was worth quite as much. I think I testified to seventy five cents below.

Q. Did you testify that it was worth forty cents before the other jury? A. No.

Q. Are you testifying that you did not? A. Yes, I am testifying that I didn't so testify.

Q. Do you remember what your estimate was at the former hearing in respect to the benefits, derived from the putting through of the street? A. I remember in stating that if the street was opened in such a way as not to cut that property down it would be of benefit to it and that it depended entirely upon the grade they estab-
108 lished. They did not state to me what grade would be or had been established. I remember that I did not state anything specifically about the benefits because I did not feel that I knew, owing to the uncertainty of the condition the other property would be left in. I know if my memory serves me right that Senator Sherman offered to donate the land for the extension of 11th St. provided that it could be understood or agreed to that it would be extended on the grade of the land and not cut down.

H. R. HOWENSTEIN was called as a witness on behalf of the other property owners affected by the proceedings. He said he had been in the Real Estate Business for ten years and had dealt in real estate in the subdivision known as Columbia Heights and that affected by the extension of 11th Street. After testifying in relation to other prop-rty — was cross examined by the Counsel for the District of Columbia.

Cross-examination:

Q. Had you sold any property either on or adjoining 11th Street prior to the Act of March 3, 1899 and did you sell any property after 1901? A. Yes sir. Along the line of 11th Street. I sold lots on Yale, Princeton, Roanoke, Harvard and Whitney Avenue. Sold lots 18 and 19 in Blocks 25 of Columbia Heights before the street was extended, for fifty cents a foot and sold the same lots about a year ago for the same price.

Commissioner OYSTER:

Q. What is your opinion as to the benefit of the property all along the line of 11th Street from Florida Avenue up, if you have any opinion as to whether or not it has been ben-fited? We would like you to commence at Florida Avenue and go out. I want to
109 know if the property along the line has been benefited from Florida Avenue up? A. There are some lots which I do not think are benefited. I can give you a general statement making some explanation.

COMMISSIONER:

Q. I do not want to take each lot separately. A. I think each corner should be taken separately according to the size of the lots.

COMMISSIONER:

Q. Take Florida Avenue. What effect if any has the first block of Florida Avenue been benefited? A. None at all.

Q. How about the next block (block 27)? A. Taking into consideration the fact that the party who owns the other lots, I think that the lots in Block 27 on the west side, the corners, have advanced 10 per cent. of its value. The lot next adjoining about 5% and the next two lots 3% after that nothing.

Mr. SINCLAIR:

Q. Now were you familiar with the conditions existing out there in this neighborhood in 1899 at the time this act of Congress providing for the extension of 11th Street was passed? A. Yes, I lived there, lived on Princeton between 13th and 14th Streets before 11th Stre-t was cut through. That property there (referring to Block- 27 and 28) was just like a big country place.

Q. Was it valuable for anything before 11th street was extended? A. It was valuable for house building.

Q. Where would the houses have been put? A. They could have been put anywhere except on 11th Street. They could have been out on Clifton Street. Of course that would have been called a blind street. Many of the streets West of 14th Street in Columbia
110 Heights are what is termed blind streets, the same as this street would have been, and land is higher there than on the through streets. Clifton street was there, but it was not improved with macadamizing and sidewalks down quite so far as 11th Street.

Q. Clifton Street could not have been extended before 11th Street was opened? A. Clifton Street has not been since it was

opened. It is now just as it was before the street was opened excepting that it has been cut down to the grade of 11th Street. Prior to that it was on the grade with 13th Street and the other house that stood there near the corner of 13th Street. This ground (referring to Blocks 27 and 28) was just a big grove covered of course with trees like a big country place. This property over here (referring to the Schneider property) on the east side of 11th Street had some fine residences; and Mrs. Logan lived here indicating 13th and Clifton). This property (referring to Blocks 27 and 28) has really gone back on account of 11th Street. It has been damaged.

Mr. SINCLAIR:

Q. What makes you say that property has not been benefited by that extension, Mr. Howenstein, give us your reason? A. I will tell you why; this property was considered very high class property. It was on the top of a beautiful hill, because it overlooked the entire city, and they were away from what is known as a very poor element, 11th Street below the boundary. If you bring this property down to the grade by cutting this street, if the houses would face
11th Street it would effect the whole square and throw those
111 who would occupy Block 27 and 28 into the class of people that are undesirable.

Q. You have taken into consideration in your answers the fact that it is left above grade haven't you? A. They are grading it now. I did not take into consideration the grade at all.

Q. You would not have said that the property had not been benefited if it were made to appear that the owners of the property have been awarded damages to bring it down to the grade of 11th Street?

To which question the Appellant's Counsel objected on the grounds that there had been no evidence to show such to be the fact and on the further grounds that it was apparent that the amount claimed to be awarded was not sufficient to pay more than ¼ of the cost of grading the property.

Q. Assuming that the property owners were awarded sufficient money to enable them to adjust the property to the new grade, would that alter your opinion which you stated here your property had not been benefited?

To which question the Counsel for the Appellant renewed their objection but the said jury required the witness to answer and the said Appellant excepted. Said witness answered:

A. I do not think the extension of 11th Street has benefited that property at all even when it is brought down to grade.

Q. Now about these sales that you spoke about a while ago, are you positive that they were made prior to March 1899? A. I am positive that they were made prior to the physical extensions of the street and prior to the Act of Congress, providing for the opening
of the street. We represented the owners of lots in the neigh-
112 borhood, most of them were out of town people and they kept writing us about this purposed extension and for that

reason it has brought it to my mind more clearly than it would have been otherwise. The lots I refer to as having been sold by owners of the same, who were not obliged to dispose of the same.

Q. We want you to put a value on this South west corner of Clifton and 11th Streets. A. I would not undertake to put a value on it before it was opened, but I would say after the street was cut through it was not worth more than 10 cents a foot considering the grade.

PHELAN C. HAWN.

And thereupon the Appellant called as a witness PHELAN C. HAWN a member of the firm of Lieberman & Hawn, who testified in substance that he had been engaged in the real estate business in the District of Columbia for over 15 years; that he was familiar with the land known as Columbia Heights and Todd & Brown Subdivision through which the extension was made.

Q. Were you familiar with the land prior to or about the last part of the year of 1899 and the first part of 1900? A. I was familiar to this extent; that there was not a week but that I went out there with my partner who had dealings in that property. I have both sold and purchased property in that section for my individual use and representing customers. I have been out there a great deal of the time before the extension of the street and since then. There has hardly a month passed but that I have had some dealing out there. Have sold Lot 6, Block 25, Lot 19 in the same block; Lot 23 in Block 25 cost, thirteen years ago, forty-five cents per square
113 foot and it was sold a short time ago for forty-seven and one-half cents. At the time the sale of that lot the owner of the same had to give an indemnity bond to pay any taxes that might be assessed in this case, therefore it may be said in this as in others cases it sold clear of any incumbrance that might be placed upon it by assessment. There is hardly a street in Columbia Heights but we have had some dealing in; I cannot give you the numbers of all the lots now, of each particular lot. My evidence is based upon actual experience, that these lots, specially on these streets and avenues at right angle of 11th Street, are not selling for any more than they were prior to the extension of 11th Street.

By Mr. SMITH:

Q. Did you include the corner lots? A. I want to say that there are a few corner lots that might be increased in value now, but according to my own opinion, and we have made many sales there that will show upon the record, I think they will show that those lots were selling for about the same figure; and in some instances lots have sold in the last 2 or 3 years for lots less than they did before the street was opened.

COMMISSIONER:

Q. Did any sell for more? A. Now I cannot say that from my own personal knowledge. There are some instances, I do not think I can give in as evidence, because I was not a party to the sale; but

the evidence satisfied me that they paid more for the ground when they bought it before the street was opened than they obtained for it in selling it afterwards.

Mr. SINCLAIR:

Q. This evidence in that respect is heresay? A. That cannot be said as to some of the property for especially one lot sold by
114 Mrs. Spelehouse showed *showed* me the original papers and the contract.

Mr. SIMMONS:

Q. Are you acquainted with the property in Blocks 27 and 28 running from Florida Avenue to Roanoke? A. I was out there on that particular ground in the last thirty days, have been all over the property time and time again. If I remember correctly 11th Street has been cut down at Clifton Street over 30 feet.

Q. Tell the jury whether or not in your opinion that land (referring to Blocks 27 and 28) was benefited by the cutting through of the street. A. No Sir, In my humble opinion I think it has been damaged very very materially, and my reason- for saying that are these; you would not want to build a house 30 feet above the street, you could not do that and could not sell it there; In the next place that land was one of the prettiest points I know of. It was a beautiful place up there. I would consider that ground retaining its original altitude—that street with its original altitude, was very much more desirable than it would be on its present grade, very much more.

Commissioner CHURCH:

Q. Suppose they had cut it down to grade? A. I say that would not be as desirable as on its original grade. I would even prefer it in its original condition to being on grade with the street below.

COMMISSIONER:

Q. As a whole? A. I would rather subdivide it on its original grade than to subdivide it on the 11th Street grade.

COMMISSIONER:

Q. And go up 38 feet? A. I am looking at that piece of property as it was originally. It was a very nice piece of property
115 with good altiu*t*de and nice pretty viev, the lay of it was beautiful, as a whole or subdividing it into lots it would be very much more desirable, as a whole as it was originally, than cut down to grade. I would rather have it, any way you make it, in its original condition.

Cross-examination.

Mr. SINCLAIR:

Q. How could it have been utilized in its former condition? A. It could have been utilized for houses on Clifton Street and by

cutting a street through the center of Block 28, which will have to be done eventually by the land owners.

Q. Could Clifton Street have been extended before 11th Street was? A. Yes, Clifton Street has not been extended any more than it was before 11th Street was extended. The only difference between its condition now and before 11th st. was laid out and cut through, is that Clifton Street has been cut down to meet the grade of 11th Street. It may be said that it would be a blind street, like Bacon, Welling and many other streets on the West side of 14th St. but the land is selling in these streets as well as in any others which are not so called blind streets. I would rather take my chances with this Clifton Street frontage and the other frontage the property had, independent of 11th Street as it now stands. The opening of Clifton Street was not dependent upon 11th Street. I would rather take my chance to subdivide or build on it in its original altitude, with a blind street than to take it as it exists today. There could be no objection to running a street from 13th Street east, through the middle of Block 28. The only change you have by 11th
116 Street being extended is the frontage on 11th Street, and it would be best to front the houses in the North and South direction, they would sell for more than if they were fronted on 11th Street. The question in my opinion is this; that the benefits, if any, which I claim there are not from 11th Street extension, and the opening of the same—either on grade or not on grade, would not compensate me for destroying that beautiful piece of land as it stood. Now that is my honest unselfish opinion. I have no interest in the property whatever and do not know for certain who owns the same. The opening of Clifton Street was not contingent upon the opening of 11th Street; that street stood as I said before in the same position as Bacon, Benney, Euclid and the other streets on the west side of 14th Street and could have been utilized without any change of grade just a- those sts. are.

Q. Assuming that the former jury awarded sufficient money to enable the property owners to adjust the property to the new grade, would that alter your opinion in reference to the benefits relating to that property?

This question was answered over the objection and exception of the Appellant's counsel.

A. I said and I still say in my opinion, I do not think it would. In other words, if the District paid the actual cost of excavating and putting the land down to grade, that would not compensate me, if I was the owner of that land; I would rather have it on its original grade.

Commissioner CHURCH:

Q. You would give more for it? A. Yes sir, I would give more for it in its orignal condition.

WILLIAM H. TERRELL.

And thereupon WILLIAM H. TERRELL came and testified
117 in his own behalf and as owner of Houses Nos. 1021 and 1023 Dartmouth Street, being situated within 200 feet of 11th Street.

Mr. SINCLAIR:

Q. Go ahead and state what you have to say about the houses. A. These houses were originally sold for $5250.

Q. When was that done? A. That was done in 1900, I think. I think it was $250 I paid for the expense of opening an alley in the back of the same, so the houses averaged $5500 cost. One of the houses we have been trying to sell for $5500 and we have not been able to sell it for that.

Commissioner OYSTER:

Q. How do you account for the deterioration in value, if any? Q. There would be very little deterioration in the houses, because they are well built houses. They are eight room houses with hot water and heat and they are good houses. The houses could not be built to-day for $5000.00.

Mr. OYSTER:

Q. It is not the fault of the extension of 11th Street? A. No sir, 11th Street did not prevent the selling of the houses nor do I think it helped the selling of them.

And thereupon said witness was requested to testify on behalf of the District of Columbia as to property in Blocks 27 and 28 and the Appellant by its counsel objected to his testifying on the grounds that the District had announced its case closed, and on the further grounds that the witness had not shown himself qualified sufficiently to testify. The objection was overruled and the Appellant
118 excepted.

DISTRICT COUNSEL:

Q. Assuming the owners of the property (referring to Blocks 27 and 28) were awarded $16,000 as grade damages to enable them to restore the property to the new grade, to what extent would you say the property had been benefited by the extension of 11th Street? A. If the amount is sufficient to grade the property it has been benefited very much. These lots are very long they could have the frontage on 11th Street.

Q. Would you make the same answer to the property on the east side of 11th Street, the property known as the Schneider property, assuming that sufficient money had been awarded to grade it? A. Well I would say this, that the property on the East side near the Hospital would be very poor property to sell. I know they had good houses there for rent and they were unoccupied for a long time and are unoccupied yet. I am speaking of the new houses that were built 3 or 4 years ago on the east side of 11th Street just above Clif-

ton. The value of the property abutting this hospital ground is comparatively very little.

Cross-examination.

Mr. SIMMONS:

Q. I want you to look at Block 28. You do not claim that any of this property on Florida Avenue has been benefited? A. No sir.

Q. You notice these lots (referring to lots in Block 28) are 200 feet deep. Assuming that the land is susceptible to subdivision, by cutting a street running East and west through the center of Block 28, as the property owners are now doing, and that these lots would then be made short, that Clifton Street was right on the
119 grade level of 13th St. before the street was opened; that this large house of Mr. Schneider's was about here (indicating the south side of Clifton Street and the east line of 11th Street), one of the houses having cost $21,000 to build and the other was a large frame house; the Barber Mansion is here (indicating Block 29); and Mrs. McCullum's house east of Mrs. Logan's house towards 11th Street. Taking into consideration the situation with all these fine residence- and the altitude of the property, would not this property have sold for much more in that situation than it would after it is brought down 38 feet? A. Which property are you talking about, this property in Block 28?

Q. The whole of Block 28. A. Yes sir, it would have sold for more. Yes sir, you notice when such subdivision as you refer to is made the lots would only be a little over 100 feet deep that is the way the property owners are grading and cutting that street through now.

Q. Then you think cutting it down would not enhance the value of it? A. It would not.

LOUIS H. MEYERS.

And thereupon the Appellant called as a witness LOUIS H. MEYERS, who testified in substance that he had been engaged in the real estate business since 1892. That he was very familiar with the property in Columbia Heights and that property called Holmead Manor, which lies just North of Columbia Heights. That he had sold and bought property in Columbia Heights and built a great many houses in the two subdivisions in the last 8 or 9 years. That he bought and sold property for various clients in Columbia Heights and made loans etc. in the same.

120 Q. Look at the property between Florida Avenue and Clifton Street and that up to Roanoke Street, and tell the jury, assuming that the property was left by the cutting through of 11th Street 30 feet above grade, whether or not the property would be worth more before the street was cut through than it would be after the street was cut through? A. I sould say that it would be worth more before the street was cut through. I am very familiar with that tract of land and know that it has been damaged a great deal by the cutting down of the street. I would rather have it in its original state. I believe it would bring much more to the owner, if 11th Street had never been cut down.

Cross-examination.

Mr. SINCLAIR:

Q. You testified, specifically, about the Sherman property down here (referring to Blocks 27 and 28) you say that it has been damaged? A. I certainly say so, unquestionably.

Q. I asked you how it could have been utilized advantageously before the street was extended? A. Clifton Street was in the same condition that it is now, excepting that it had been cut down to grade of 11th Street; and a street could have been run through the center of Block 28 as the owners will have to do eventually.

Q. Was it practicable to build on 11th Street before it was cut through? A. I think not, of course the street was not improved. It was as much a street as this (referring to 11th Street). There were no improvements on that then, it was as much a street as any street was in Columbia Heights. I have known ground to sell on some of the streets as high as $1.35 per square foot before the street was opened up, and there were no improvements there then at
121 all. 11th Street has not been made sufficient, in my opinion, by bringing the parking down to the grade on the property line, to give the owners a chance to put down side walks, which all of them have not done. I consider that very detrimental to the property, by leaving a great bank in front of it.

Q. You say that property (referring to Block 28) could have been utilized advantageously before 11th Street was extended; tell me how and in what manner? A. I say it is damaged now. They could have utilized it by putting on it houses like the Barber Mansion, or other large houses like the Logan House. It would not matter if it was a blind street. You could come down Clifton Street to 13th Street or 14th Street then the same as now or it could have been subdivided by cutting a street through the center without 11th Street; or cut up into large lots for houses of the larger class. There is no question that the property has been damaged by cutting the street through and by grading the property down.

Redirect examination.

Q. Mr. Meyers I understand you to say that this land (referring to Block 28) is susceptible to subdivision by cutting a street through the center of it and that by reducing that property down it has damaged it instead of benefited it? A. I certainly think so and that is exclusive of any grading question.

LOUIS P. SHOEMAKER.

And thereupon LOUIS P. SHOEMAKER, called by other property owners and being duly sworn, it being admitted by the District of Columbia that Mr. Shouemaker was fully qualified as an expert in real estate values in the section referred to, having first testified that he was not an owner of any property in the vicinity of 11th
122 Street, or interested therein and having testified in relation to certain property abutting upon 11th Street north of Blocks

27 and 28, said, in his opinion the opening of said street was of general public benefit, but to what extent it benefited the property along 11th Street in dollars and cents, he could not say. That if said 11th Street had been simply opened and no car line put upon it, there would have been no improvements upon said property to day. He thought the car line had brought about the only benefit that had accrued to said property.

Said witness after testifying as aforesaid as to certain specific property was then asked.

CORPORATION COUNSEL:

Q. What would you say the property down here indicating Block 28 was worth before the street was opened?

And thereupon the Counsel for the Appellant objected to said witness testifying in relation to the property in question on the grounds that he had not been called by the Appellant and that the District had closed its case, but said witness was required to answer the question over the Appellant's objection and exception.

A. I don't know anything about the property, I would like to look at the property and I would like to know whether it is ten feet feet above or ten below the grade.

The CHAIRMAN: "He doesn't seem to know anything about the lots except the lots he has testified in reference to." Yet said witness was required to answer.

Witness, said:

This property was worth more before the street was cut through, but the cutting down of 11th Street necessitated the cutting down of the hill and it cost nearly as much as the ground was worth to do it.

Q. You mentioned the fact that this property was left above grade, assuming that sufficient damages were awarded the owners of that property, referring to Block 27 and 28, to adjust it to the new grade, what is your opinion in reference to that property?

123

To which question and answer the Appellant's objected upon the grounds before stated. The witness having stated that he knew nothing about the condition of the property, but said witness was required to answer and the Appellants excepted.

A. Of course it is worth more after it has been graded than it is now above grade, but it is the car line as I have stated, that creates the value of that property. I think that if any benefit has accrued to it, it has been on account of the car line.

Q. Would you say that the pendancy of these proceedings have had the effect of keeping down the prices out there on account of the fact, that the property along the line of the extension might be assessed for benefits in the future. A. I hardly think so on the contrary the general impression is that no benefits would be assessed.

WILLIAM A. HILL.

And thereupon WILLIAM A. HILL, President of the Moore & Hill Co. was called and testified in substance:

I have been engaged in the real estate business over 11 years and am very familiar with the property north of Florida Avenue along the line of 11th Street and knew well the condition of affairs there and the value of the property in 1899 and have kept continuously posted and familiar with the same by dealing in said section constantly for the clients of said company.

Mr. SIMMONS:

124 Q. Look at this property (referring to Blocks 27 and 28) and state to the jury whether or not you think that land has been enhanced in value by cutting the street through, taking into consideration the fact that it is susceptible to subdivision by cutting a street through Block 28 east and west from 13th Street, and taking into consideration that Clifton Street was then on the grade level of 13th Street, which street was improved and concreted and that the large Schneider Residence was situated just east of the line of 11th Street an- South of the line of Clifton Street and the other improvements surrounding the place prior to the opening of the street, and state whether or not in your opinion it would be enhanced in value by reducing same down to 30 ft.? A. I don't think that property was benefited, taking into consideration the whole subdivision.

Q. State whether or not those lots would have sold for more left up in the original condition with the surroundings they had, with the Schneider house to the East and the other fine residence to the West—state whether or not it would have sold for more before the street was cut down than it would when the property is brought down to the present grade of 11th Street. A. I think it would have sold for more without being on the bank. I think those lots (referring to the lots fronting on Roanoke Street for a depth of 85 feet would be slightly benefited. I think that ground as whole was worth more 3 or 4 years ago than it is today. It was a better class of property and you could get more for it then, than you could today. It is worth more before the street was cut through, generally it was a better market for it. It would have brought more 6 years
125 ago than it would today; in other words it would have brought much more before the street was cut through than it would after the street had been graded down.

Cross-examination.

CORPORATION COUNSEL:

Q. Would it have been practical to have utilized Blocks 27 and 28 without the opening a street north and south? A. As I understand Clifton Street was supposed to be a street there to the other end, and no one would have built upon there without it being graded if it was above grade. But it was known ever since I can

remember, for the last ten or twelve years, that Clifton Street was as shown upon the map and plat booked as it is now.

Q. Suppose it had been, could that property have been made use of in view of the fact that Clifton St. was a blind street and had no outlet on the East line until 11th Street was extended? A. I don't believe it would make any material difference for the reason that Bacon St., Benney St., Huntington Place, and other such Sts. west of 14th Street, we could get prices for houses from 18 to 20 thousand dollars and they were blind streets, as you call them.

Q. Would it have been practical to build upon these two lots fronting upon Clifton Street at that time, in view of the fact that 11th Street was not opened? A. Yes. I think Clifton Street is sixty feet wide.

Q. And then assuming that the owners of that property had been awarded sufficient money to enable them to adjust the property to the new grade?

To which question the Appellants objected.

Commissioner CHURCH:

126 Q. State that they were awarded sixteen thousand dollars.

Mr. SIMMONS: Assumed that sixteen thousand dollars was allowed and it would cost near $58,000 to do the work.

CHAIRMAN: I don't believe you can assume that they gave too much or too little money. That is a question that would require a great many witnesses, and I think we should hold the witnesses to the assumed fact.

Mr. SINCLAIR:

Q. Assuming that the former jury awarded $16,000 to the owners as grade damages in Block- 27 and 28 enabling them to adjust the property to the new grade necessary in addition to the damages to the land taken.

WITNESS: Would sixteen thousand dollars grade the property?

A. If the money allowed was sufficient to do the grading I would think it would be benefited by grading it of course.

Redirect examination:

I think that this land up here, referring to Block 28 would sell for more on its original grade: I would take these lots and cut a street through the center, as has been indicated, which will have to be done eventually. You need not subdivide on 11th Street at all. By subdividing all this way, indicating so that the houses would front North and South, they would be more desirable than if they fronted on 11th Street, I think the extension of 11th Street would be of benefit to the lots that had no outlet at all, if they had been left in such condition that it could be used without spending more than it was worth to grade it.

127 H. ROZIER DULANEY being called on behalf of owners of property North of Roanoke St. and having testified in relation thereto,

Cross-examination.

Mr. SINCLAIR:

Q. You stated that the residential property out there did not require 11th St. Do you mean that to apply to the South of Roanoke St., Block- 27 and 28?

To which question the Appellant by its Counsel objected upon the grounds that the witness had not been interrogated about said property and that upon further grounds that the District Government had closed its case and couldn't call said witness in its own behalf. Said witness was required to answer and the Appellant excepted.

A. I simply meant to apply to such properties as had plenty of facilities and multiplying thoroughfares did not give any additional value to it.

Q. Did you say that property between Florida Avenue and Euclid Street and 13th St. and Sherman Avenue had plenty of facilities? A. I don't see where they get any increased facilities. I have not studied out that at all. It would take me some time to work it out. I don't know what the original plat out there shows. I am not familiar with the particular section as a big tract there is not subdivided except into original lots. Every one of the original lots seem to have the frontage upon a street and only those lots could get an increased number of lots that turn on 11th St. and be benefited on account of the street cars. If you would put a car line up Sherman Avenue, it would be of just as much benefit to the other property. I don't know anything about the grade. I don't know what the grade was and haven't for a long time.

128 REGNALD W. BEAL was called on behalf of Appellants and other property owners, to testify in relation to the land lying north of Roanoke Street and having first testified that he had been engaged in the Real Estate Business for more than 15 years and was familiar with the property in the vicinity of 11th Street and from Florida Avenue up North and having stated that he had dealt extensively in property in the section through which 11th Street passes, both before the street was extended and since and then having testified in relation to said other properties north of Roanoke Street was asked:

Q. Mr. Beal I want you to look at the plat showing Blocks 27 and 28 and assuming that that property is susceptible to subdivision, by cutting a street through the center of Block 28 from 13th Street; that Clifton Street running East from 13th Street was on grade of 13th Street; and state whether or not you believe that property will sell for as much after that street was cut down, and the property brought down to grade, as it would in its original condition. A. Well, that is a rather large question. If they had left

this property as it was, they could have put these streets through Block 28 and a street through here North and South through the middle of Block 27. This result of bringing this down grade would be, I suppose, to bring this Florida Avenue and this minor street on grade with this section here, South of Florida Avenue, which is rather objectionable. And so the ground up here, the elevation here being high and her- also referring to the North side of Clifton Street would be rather more desirable. To bring that down to the level of 11th Street, the ground would not sell for as much.

Cross-examination.

129 Mr. SINCLAIR:

Q. You think it would not sell for as much? A. It would not because you have a good view here over the city. This street here Fla. Ave. would not be affected either one way or the other. I would say generally that the opening of 11th Street has not been of great advantage to any property. Generally speaking the opening of a street helps property, but special lots, leaving them in bad shape and above grade, makes a different question.

Q. I will ask you whether or not Block 28 was available for building purposes before the extension of 11th Street, assuming that Clifton Street was a mere paper Street? A. Well, Mr. Sinclair, 13th Street was on grade with Clifton Street. 13th Street is of course not what you would call a driving street. Cutting this property down to grade and bringing all the property down to the level of cheaper houses would injure it; if you keep it up in the air you keep it high and above the common class of houses; and the location would be better than cutting it down. It was entirely feasible as such subdivision has been suggested and which will eventually have to be made. It is not against the law to put that street through there, referring to the street through the center of said block 28, to utilize it for small lots. It will be necessary to cut a street through the said block and the owners of the same could have also given the street up the hill from 11th Street and thus avoiding grading the property. It would have been more or less impassable for teams on account of the steep grade as the case with 13th Street, but would have been more desirable for residence property.

130 DAVID J. HOWELL was called as a witness on behalf of the appellants.

Said witness testified in substance that he was a civil Engineer and had been engaged as such for nineteen years that he had a long experience in making subdivisions and platting of ground in the District of Columbia and other cities, that some time in the summer of 1905 he was called upon by the Columbia Heights Realty Company to plat, survey, and superintend the grading of Blocks 27 and 28 in the subdivision known as Columbia Heights.

Q. What grading to those squares was made necessary by the cutting down of 11th Street? A. The grading is not all completed yet but the estimate is 110,000 cubic yards as follows:

Block 27:

Lot 25	639	cub. yds.
Lot 26	881	cub. yds.
Lot 27	994	cub. yds.
Lot 28	1115	cub. yds.
Lot 29	1361	cub. yds.
Lot 31 west of the bldg. line	1020	cub. yds.
Lot 1 west of the bldg. line	2078	cub. yds.
Lot 2	2426	cub. yds.
Lot 3	2304	cub. yds.
Lot 4	2240	cub. yds.
Lot 5	2294	cub. yds.
Lot 6	2407	cub. yds.

Block 28.

Lot 14	18287	cub. yds.
Lot 15	24015	cub. yds.
Lot 16 west of the building line	19454	cub. yds.
Lot 1 west of the building line	12465	cub. yds.
Lot 2	12120	cub. yds.
131 Lot 3	10766	cub. yds.

This does not include any of the land West of the land mentioned which will probably have to be further graded. It does not include any grading along the line of Florida Avenue except at the extreme rear of the lots fronting on said street made necessary by the grading and cutting down of the said 11th Street.

And whereupon said witness was shown the Exhibit A, following map or plat showing the proposed subdivision of said square or block 28 and asked:

Q. I want you to look at the plat and state whether or not the subdivision or division is susceptible to such subdivision without regard — 11th Street. A. Yes sir, we are cutting through all the streets shown on the plat except Clifton Street and 11th Street. We are cutting this street indicating a street from 13th Street East through Block 28 and a street through the center of Block 27 running North and South and bringing all the property down to the grade of 11th Street and Clifton Street which is made necessary by cutting through of said 11th Street. We are paying for the entire work estimated at 48 cents per cubic yard which comprises steam shovel work and scraper work. The scraping on the most part of Block 27 would be less than 48 cents while the steam shovel work in Block 28 would be worth more approximately which would make it about 65 cents in Block 28.

Cross-examination.

Said witness said that he had *a* charge of said work from the beginning, that he had prepared the plat referred to of said Blocks 27 and 28, that he was having the land graded and adjusted to the situation of 11th Street and Clifton Street.

132 Q. How far is the property above the grade of 11th Street? A. It averages from 28 to 38 feet according to my recollec-

tions. I can tell you from point to point but it is different at different places. We have not finished the grading. We propose to bring the property down to within 6 feet of the sidewalk. It is already on grade with 13th Street.

Q. You say there is 110,000 cubic yards which would have to be removed to bring it to the new grade? A. Yes, it will be a great deal more if you bring it down to the street.

Q. My question was as to whether or not this represented the total number of yards to adjust it to the new grades? A. Yes sir, it adjusts it to the new grade with a terrace but not down to the sidewalk. The reason we did that was because the grading was so excessively high.

Q. You say 48 cents per cubic yard is the average cost of the entire work? A. That is what we have started to pay; I don't know what we will pay before we get through.

Q. Do you think that is too much for the entire job? A. I don't think that you will ever get another contractor to do it for anything like that, and I don't think these fellows will ever do it again for it is a very low price and we are likely to have to finish some of it or let it another contract for a higher price. The contractor has agreed to do the entire job for 48 cents per cubic yard but he is a way behind in his contract.

WILLIAM H. SAUNDERS was produce- as a witness on behalf
133 of the Appellants and testified in substance as follows:

That he was the proprietor of the Real Estate firm known as William H. Saunders & Co. and had been engaged in the business for 18 years; that he had a special knowledge of the property in Columbia Heights along the line of 11th Street, had dealt extensively in said subdivision before and since 11th Street was opened; and after testifying in relation to other property was asked:

Q. Look at Block 28 on the plat and state whether or not you are familiar with that land of Clifton Street between 11th Street and 13th Street? A. Yes, I am reasonably familiar with it.

Mr. SINCLAIR:

Q. Before the extension? A. Yes.

Mr. SIMMONS:

—. State whether or not in your opinion as a real estate expert, had this property been subdivided as shown here with a street running east and west through the center and 11th Street had been never cut down, this property would sell in its original condition at a better price than it would after 11th Street had been cut through and the land graded down to the street. A. That property, as it is now, cut down to the street, we all know what can be made out of it. It can be used for about the class of houses that people will build on just such property as that. It has its advantages so far as the small size of the lot can be made, but it has its disadvantages in the fact that just across the street on the East is a very forbidding bank an outlook that will never be satisfactory. On Florida Avenue they

have very serious objections in regard to the class of people.
134 At the end of the property, here referring to Florida Avenue and 11th Street, is effected by the class of improvements at this end. If that property had been left as it was it could have been sold to advantage for some purpose, with an entire class of improvements different from these. Of course as a site of a college or other large building and for such purpose as that, I think to a certain class of people the property would have sold better or the result would have been better in its original condition. The fact of the fine outlook, the view above would attract people who would not care to be on the section below or practically on a level with it. I think if the property had been left on its original grade the situation would have been better, that there would be more money in it.

Cross-examination.

Mr. SINCLAIR:

Q. A better class of people would have occupied it? A. A better class of buildings, a better class of houses, rather than to have these disadvantages I spoke of.

Q. What effect would the proximity of the Garfield Hospital have upon the attractiveness of the property? A. That was already there. I didn't take that into consideration. I don't think the hospital adds anything to the advantage of the neighborhood, though that was not taken into consideration because the hospital was already there.

Q. Would the hospital have added to or detracted from its attractiveness to that class of people? A. I think that people more fastidious would probably go to Washington Heights, than would go over there near the hospital; but it is not an absolutely
135 forbidding proposition for a man to build a good house in that neighborhood, for it has been done, take the Schneider House for instance.

Q. You would not say that the property was available for subdivision before 11th Street was cut through? A. Clifton Street existed before the extension and though it was a blind street there were houses there then. Of course if you wanted to build small houses on small lots it is better to have it cut down and ready to put one house alongside of the other. But for a large class of buildings with liberal grounds I think the original situation would work better as they would put a better class of buildings.

CHARLES S. BUNDY presented himself to testify as a witness in his own behalf qualified and was accepted by saying that he was a justice of the peace of the District of Columbia and owned Lots 9 and 11 in Block 12 of Todd and Brown Subdivision; said lot line being forty feet and 50/100 from the line of 11th Street extended. Said that he did not think that his property, said lots, had been benefited in any particular by the extension of the said street, and that he thought the verdict of the former jury whereby he was assessed benefits because of the extension of 11th Street to the extent of $338.00 on lot 9 and $140.00 on lot 11 was an outrage. That the extension of the said 11th Street had been of very little benefit on account of

the peculiar shape it left lots in, some of them being cut off in points and left in irregular shape. "What I say is this, that the very act
of converting *Acerage* property into subdivided city prop-
136 erty *property* conferres a benefit upon that, without doubt
a very great benefit. But where, as in this case here, you already have streets to a sufficient number and lots so that every man has *excess* to his lot, what more benefit is to accrue by such an extension as the opening of 11th Street? For instance, I bought some lots fronting on Bismark Street because immediately I could improve them, and did so because I thought it would pay me to do so. I didn't ask for this street; what benefit is it to me or to these people here? You don't want more than enough of anything. If an old woman has a large cat and a small cat she don't want a large hole and a small hole for those cats to go through.

The large whole will be sufficient for both cats. When a man has *excess* to his lot, what benefit is it to him to give additional *excess*." And thereupon he was called upon by the Counsel for the petitioners to testify in relation to Blocks 27 and 28, without showing any other qualification than as aforesaid, that he had owned two lots in the section, never had owned any others or dealt in any others and to the questions and answers in relation to said property the Appellant by its Counsel objected to any testimony by said witness in relation to the said property, on the grounds that the witness was not an expert and had not shown himself competent to testify. But said witness was permitted to answer and the Appellant by its counsel excepted.

Q. What is the benefit that has resulted to the property in those two blocks for the reason of the opening of 11th Street? A. I cannot say more than this, as Mr. Simmons says I am not an expert in Real Estate and don't know anything about property except as in a general way. This opening has given the property belonging to
the Sherman heirs a front whereas before it had no east and
137 front. It now has an east and front of one thousand feet.
That would give fifty, twenty foot lots width and one hundred feet deep. They are now at work grading that property, tearing the ground down and excavating it.

Q. To what extent would you say that property had benefited as a whole? A. I don't want to testify any more than that is the apparent fact.

Q. Before the passage of the Act of Congress for the extension of 11th Street, what were the conditions with regard to the improvements between Florida Avenue and Roanoke Street? A. There were no improvements. This was a wood lot with only two houses on it and he built another little house down here somewhere for a carriage house. The rest was a wood lot.

Q. What would you say that the Sherman property was worth before the passage of the Act of Congress March 3, 1899 providing for the extension of 11th Street? A. I don't know anything about it.

Q. In saying that this property, the Sherman property has been benefited, have you taken into consideration the grading of the

lots? A. Oh! Yes. I bought lot 9 in September, 1895 and I bought lot 11 in said block 12 in June, 1898. I paid 36 cents per square foot for each lot.

Said witness further testified that said street was opened for the benefit of the railroad Company, that is to say, for the purpose of bringing an additional railroad through that section. I never heard of anyone trying to get said street open for any other purpose than the railroad. The whole thing originated in Congress and no one up here, referring to the section, that I know of had any-
138 thing to do with it. Said witness said he did not pretend to say that he knew anything about the valuation of the land in Block- 27 and 28 or what it would cost to grade the same.

LESTER A. BARR was called as a witness on behalf of the Appellants and testified in substance; that he was engaged in the real estate and building business, buying land and building houses for sale, and had been so engaged for twenty years; that he was very familiar with the location of Columbia Heights, had bought land and built a great many houses up there, before and since the extension of 11th Street, that he was well acquainted with the location of and had made thorough investigation of the land in Blocks 27 and 28.

Q. Tell the jury if that Block, 28 was susceptible to a better subdivision without 11th Street being cut down as it is. A. I have been over that land many time-, both before and since the cutting down of 11th Street. I think the ground was susceptible of subdivision that would have made it more valuable than it is today, that is that particular square. I think the cutting down of 11th Street has really depreciated it per foot value. It was up on the hill; It could have been subdivided for a better class of buildings and there would have been a better market for it.

Cross-examination.

Mr. SINCLAIR:

Q. Tell us how it could have been made more marketable. A. The owners of the same could have run a street down hill from Clif-
ton Street, and a street east from 13th street through the cen-
139 ter of the same. For instance if a house faced North on the South side, Clifton Street, would have run back to an alley draining that portion. Houses could have been built facing south back to the alley running east and west through the block. That would have taken care of the water. Houses on the south side of this interior street could have been run back to the alley and that would have taken care of the water there. There could have been four frontages. The one on Clifton Street, the two fronting on the interior street to be run east and west, and one on Florida Avenue. This will have to be done eventually.

Q. Are you aware that Clifton street was a blind street? A. I am aware that it stopped at the line of the Schneider property. It might be called a blind street and it would have been necessary to dedicate ground if you wanted an outlet from Clifton Street down

to 11th Street, and to dedicate ground for a street running east and west through the square, which is the case now, and that will have to be done any how. Of course before the opening of 11th Street Clifton Street had not been improved and you might say that it was a paper street, though houses had been constructed on it.

Q. Have you made a study of this question or is this a general opinion of yours? A. I have been over the ground since 11th Street was put through. I was quite familiar with it before. I did a great deal of building around through Columbia Heights.

Q. Are you aware of the fact that the frontage given to this property by the extension of 11th Street is upwards of one thousand feet? A. Yes, it would have had the same frontage if the owners had made a street themselves on grade. The only question would then have been the difference in the grade of 11th Street if
140 it had been the same frontage.

—. It would have been necessary to grade this property along Florida Avenue, would it not? A. Yes, to some extent, I am not sure about that. Of course 11th Street has nothing to do with Florida Avenue.

Q. And it might have been necessary to grade Clifton Street in view of the fact that the grade had not been fixed? A. Yes, but it was on a level with 13th Street and there was no necessity to cut it down.

Q. And it would have had to conform to any grade set by the Commissioners for Clifton Street? A. Yes, I suppose so, but there would have been no necessity to cut it down. I base my ideas of value somewhat on this; at the present 11th Street is not available for a good class of houses, as it would have been had it been placed so that they could have used the elevation. The elevation of the land made it more available for a better class of houses. As it is now, just south of Florida Avenue on 11th Street, there is a very poor class of buildings and undoubtedly that fact would effect the class of buildings that would go North of Florida Avenue, more or less.

Q. In view of the availability of the property for building purposes, before the extension, was it not very strange that it was not subdivided and built upon before the extension? A. I might answer that question in this way, I went to Columbia Heights fourteen years ago and paid one dollar and five cents ($1.05) in Block 33 for land; ten years after I paid one dollar and twenty-five cents ($1.25) in the same block and four years after that I paid seventy-five cent- ($.75) in the same block. It would have been far better if the owner of the property had disposed of all this ground during
141 that time than it would now.

Q. It is not the question of disposing of it it is the question of utilizing it. You said that it was available for building purposes, will you indicate how it could have been utilized? Is it not very strange that in view of the fact of that availability, it should not have been subdivided before. A. I think not. Senator Sherman owned a great deal of property out there and did not do anything with it.

Redirect examination.

Mr. SIMMONS:

Q. Mr. Barr, do you know that the grade of 13th Street on the West of this Block is much higher than the grade of 11th Street would have been if it had been run on the original grade of the land? A. Yes, the grade of 13th Street was more than 11th Street would have been without the grading of the land. The steepness of the hill on 11th Street would have been, if run on the original grade, of land, less than 13th Street. If 11th Street had been cut so that it would have left a five foot terrace, to this square, it would have been available amply for the use of the land but probably not for a thoroughfare.

Mr. SINCLAIR:

Q. Take the east half of Blocks 27 and 28, did you say that that part of the tract was worth more before the extension of 11th Street than afterwards. A. If I didn't consider the grade, I should say no. It would not be available in the sense that the west half of the tract is, simply because the Garfield Hospital on the East of that would prevent its use, but the said tract in my opinion did not depend upon the opening of 11th Street.

142 Q. I am talking about the east half of Blocks 27 and 28. I asked you whether that was worth more before the extension or afterwards? A. I think it was worth more before.

CHAIRMAN:

Q. How do you account for the depreciation? A. There has been a general depreciation in the value of property on Columbia Heights.

Q. On the extension of 11th Street? A. Oh, yes.

Q. Has the extension of 11th Street benefited the general neighborhood? A. Oh, yes, in a general way, I think it has.

J. J. LAMPTON was called by the appellants as a witness and testified in substance as follows; that he had been engaged in the real estate business loan and insurance, since February 28, 1893. That he had examined thoroughly and was well acquainted with

143 the square, Block 28, in the subdivision of Columbia Heights and had dealt extensively in said subdivision both prior to and after the extension of 11th Street having purchased land and built a great many houses in the said section before the said street was opened; and sold a great many houses and lots for clients since the street has been opened.

Q. State to the jury whether or not in your opinion that land, referring — Block 28, would have sold for more if it had been left on its original level without being cut down than it would after it is grade- down to the street? A. I think it would have brought more if it had been left on the original grade and not brought down as it is now. I think that if you grade 11th Street up, with the grade of the original elevation, it would have been more available than *the* cut it down on a level, as it is now.

Cross-examination:

Q. Do you think it would have been benefited more if it had been given a different grade?

Mr. SIMMONS: I object. He said it would sell for more.

Q. Is that what you mean? A. I think that it would probably have sold for more money if they had graded the street on an incline instead of cutting it down and making a large embankment opposite here.

Q. Still that is better than leaving the street up on the hill. This is better than putting a street up on top of the hill without any grade at all.

Mr. SIMMONS: I object to that it is better for the public but not for the land-owners.

A. It is according to how the grade would have been made there.

Mr. SINCLAIR:

144 Q. Are you familiar with that property? A. Yes I have walked over it lately, this morning.

Q. Were you familiar with it before the extension of 11th Street? A. Yes, I built a good many houses in that immediate neighborhood prior to 1899.

Q. Then you know the topigraphic condition? A. Yes, I have been familiar with that property ever since I have been in Washington.

Q. Pretty high was it not? A. Yes.

Q. Woodland? A. Yes, there are some trees on it.

Q. What sort of street was Clifton prior to 1899? A. Clifton street was improved as far as 13th Street. You have cut it through down to 11th Street since then.

Q. That property could not have been utilized for building purposes without the opening of a street along here indicating 11th Street. Do you think so? A. I think they could have utilized it better if they had made a different subdivision of the land than cutting down 11th Street. It would have been necessary to have provided a street up from Florida Avenue in order to get 11th Street front.

Q. In order to utilize the property? A. In order to have 11th Street front and give a street here, if you want it.

Q. Would it not otherwise have been a blind street? A. Yes, the Schneider house would have been about here, indicating at the corner of the East line of 11th Street and the South line of

145 Clifton Street from where 11th Street was.

Q. It would be necessary to put some sort of a street here, indicating 11th Street to have utilized the property on Clifton Street. It would be necessary to give an outlet down to 11th Street. A. Not absolutely necessary.

The COMMISSIONER:

Q. What effect has 11th Street had on this property? A. It has given an outlet to some lots and it has left this property on a very

high embankment, and to my mind has injured the property at the grade it has left it. It would have improved the property if it had not been necessary to have cut it down to grade; if it had not been left so high.

Q. Would you say that the property was more valuable at the time 11th Street was extended than it is now in its present condition? A. I think it was, for this reason, the people owning this property could have made a subdivision themselves and put a street through here indicating the center of the Block, East and West and they could have made the grade in such that if they had wanted the street on a line with 11th Street, that they could — utilized the street far better than it can be utilized now. 13th Street is a good deal higher than the original ground of 11th Street.

Q. You would not have left such a grade on 11th Street as is on 13th Street? A. I would rather have the property on the 13th Street grade than on the 11th Street grade.

JAMES R. ELLERSON was called by the Appellant as a witness and testified in substance: that he had been engaged in the real
146 estate business for more than 12 years and was very familiar with property in Columbia Heights, and Blocks 27 and 28.

Q. State to the jury whether or not in your opinion, as a real estate expert, that property would have sold for more without the cutting down of the land and the street—whether or not it would have been of more advantage to the property owners without the extension of 11th Street than it will with it. A. Yes, in my opinion this property has been damaged by the lowering of it. I refer to the whole property.

Q. And you mean that the property would have sold for much more if it had been left in its original position? A. That is my opinion.

Cross-examination.

Mr. SINCLAIR:

Q. What was it available for before the street was opened? A. For building purposes, the same as any other property.

Q. It would have been necessary to have run an east and west street through Block 28, would it not? A. That would be perfectly feasible.

Q. That would be attended by a good deal of cost of grading and you would have to cut a street through. A. That depends on the circumstances as to how much grading would be necessary. Some grading would have been necessary, possibly. It is necessary to do some grading in all streets to fix the foundation.

Q. To have utilized the property before it would have been necessary to have given ground for a street from Florida Avenue to Clifton Street? A. Oh! no.

147 Q. An east and west street? A. Yes.

Q. Did you not say North? A. No, I said east and west.

Q. Would it have been necessary to have opened any other street,

there referring to 11th Street, to have utilized it before the extension of 11th Street. A. I don't think so Sir. This is a street indicating Clifton Street and here streets indicating Florida Avenue and 13th Street; there are two fronts and the opening of the other street would have given four fronts.

Q. Are you aware of the fact that before the extension of 11th Street that Clifton street was a blind street? A. Yes, but it dosn't follow that it would have been necessary to give ground for a street where 11th Street is now.

Q. I am asking you if it would have been desirable? A. It might have and it might not have. From the common sense standpoint there is where I should open a street, indicating through the center of Block 28 East and West, and I think that is the only street I should open in the square.

Q. Where would that street lead to? A. It would lead out to 13th Street.

Q. Then you would have two blind streets in a square? A. Yes.

Q. And you think that property should have been used in that way? A. I do Sir, beyond a doubt. To my mind the putting of the property on grade as it is necessary now, damaged it.

148 W. S. MINNIX was called as a witness on behalf of the Appellants and testified in substance as follows: that he had been engaged in the real estate business since 1893, that he dealt extensively in Columbia Heights and Holmead Manor, that he knew the conditions of Blocks 27 and 28 well and was very familiar with said land both before 11th Street was opened and after it was opened.

Q. State whether or not in your opinion as a real estate expert, that property would have sold for more if it had been left in its original condition than it would with 11th Street cut through and the land brought to grade. A. I don't think that it would sell for as much with the street cut through and in its present condition as it would prior to the time when the street was cut through.

Q. As it would before in its original condition? A. No sir.

Q. How much less will it sell for after brought down to grade than it would on its original grade? A. I should say that if the property was left as the cutting through 11th Street left it — would not sell for anything.

Q. That is to say that it is not worth putting on grade, that is the 11th Street front. A. You could probably sell the 11th Street front when graded down for forty cents a foot.

Q. You mean to say that the property as it was in this condition way above grade was not worth grading? A. Not worth grading. I should think it would cost more to grade it than the land is worth.

Cross-examination.

Mr. SINCLAIR:

Q. Are you familiar with this property? A. Yes I have known it for 15 years. I have examined it specially with the view
149 of testifying here today. I saw it last on Saturday of last week at the request of Mr. Simmons.

Q. You are not interested in the property are you? A. Not at all, Sir.

Q. Are you interested in any property in that neighborhood? A. No Sir, not nearer than, 13th and Lydecker Sts., I own the Southwest corner of 13th and Lydecker Sts.

Q. I would like to know how that property could have been utilized to advantage before the street, 11th St. was extended. A. I think it could have been utilized from a terrace very nicely, for instance, take 22nd street between R and S Sts. This is a similar proposition to that. The ground there was above the level and they terraced it and they have a fine class of improvements. That property was in close proximity with cheap property as Clifton is, yet it was made very valuable property. The cutting of this street brings it in close touch with the property below it, which is at a very low price. That is my idea.

Q. You think as it lies now it is cheap property and is in proximity with cheap property. A. It is as it lies now with the opening of 11th Street.

Q. Is there any cheap property in that neighborhood now? A. More than there was prior to the opening of 11th Street. Nearly all the property south of Florida Avenue was improved. This property, referring to Block 28 touches Florida Avenue and it could have been kept separate and distinct from that without 11th Street it would have been a great deal better and would have sold for more money.

150 Q. You think it is worth less now than it was before the street opened. A. I do Sir.

Q. There, take Block 28, what was it available for before the street was opened? A. It was available for building on these two streets, indicating Clifton St. and Florida Avenue with the grade, the front houses could have been built fronting on these streets without cutting it down as it is now. And with another street put through the center East and West it could have been made very desirable, that is houses built on the lower side of this block three stories high would enable the second story of those above to look over them. That would have put this property on a terrace. Then you have on the property above and the property below the same effect. Then if you wanted an opening to this street, indicating 11th street you could have built a terrace. The railway is at this point very close and they could have *excess* to that by a small outlet down the hill, not a through street. An outlet could have been given this property in the way of a terrace down to Florida Avenue and made very *excessible* for building purposes. I would not have opened a street north and South all the way, probably a small passageway up as far as Clifton Street. I would certainly have not cut it down but would have left the property on its original grade.

Q. What would have been the advantage of leaving it up in the air? A. Because you get a greater elevation and a better view.

A. Is the view there especially attractive? A. This particular property would have had a view all over the city clear to Alexandria.

Q. You have a view of the car barn here at the foot of Florida Avenue on the West side of 11th Street many other things.

151 A. The car barn would have been one of the things we could have looked over the top of. You could have looked over the top of all the improvements below it.

Q. Would the proximity of the hospital there render it attractive? A. That was there and it would make no difference with 11th Street cut through or not.

Q. To what extent had Clifton Street been improved east of 13th Street in 1899? A. The property was not on the market at that time.

Q. I suppose that when you went out there the other day you noticed some grading being done? A. Yes.

Q. Did you find out how far down the property was being graded? A. It was being grade- to within about 4 feet of the street.

Q. You referred to the car line there, that tract, Block 27 and 28 has not been benefited by the carline has it? A. I don't think so, I don't think property *on* fronting on 11th Street has been benefited by the car line. The property on the cross streets would be benefited by a car line for the reason that nine out of ten people will not buy houses that front on car tracks. Another thing the opening of this street has permitted the building on small lots, and they have put up a very cheap class of improvements. And I think that it has been a detriment except for the car line facilities. You cannot sell a house fronting *ing* on a car line to one man in ten. The first thing they say if it fronts on a railroad they don't want it.

152 Commissioner FRAZIER:

Q. Is there not considerable building going on along the street now? A. Yes, but as I said before the class of buildings are such as we did not have up there at the time 11th Street was opened.

Mr. CHURCH:

Q. Did you say that the cutting down of these lots Block 28 that front on 11th Street would leave them only worth forty cents per foot? A. People would probably pay forty or forty-five cents for the lots not too deep for the purpose of building small houses.

The COMMISSIONERS:

Q. What was it worth before it was cut down? A. It could be sold in sites to such as any of you gentlemen as a nice place to build a house on and would have been absolutely exclusive of the cheap grade of property that this street allows it to have *excess* to. It was available for such houses as the Logan house, the Schneider house, and the McCullum House in the neighborhood. A man could have built upon that place and have had just as nice a home as any body would want. You could have had *excess* to Florida Avenue with a simple drive way or terrace steps or whatever the owner of the property should choose to put on it. My idea of it would have been to have left it as much on its original grade as possible.

Mr. SMITH:

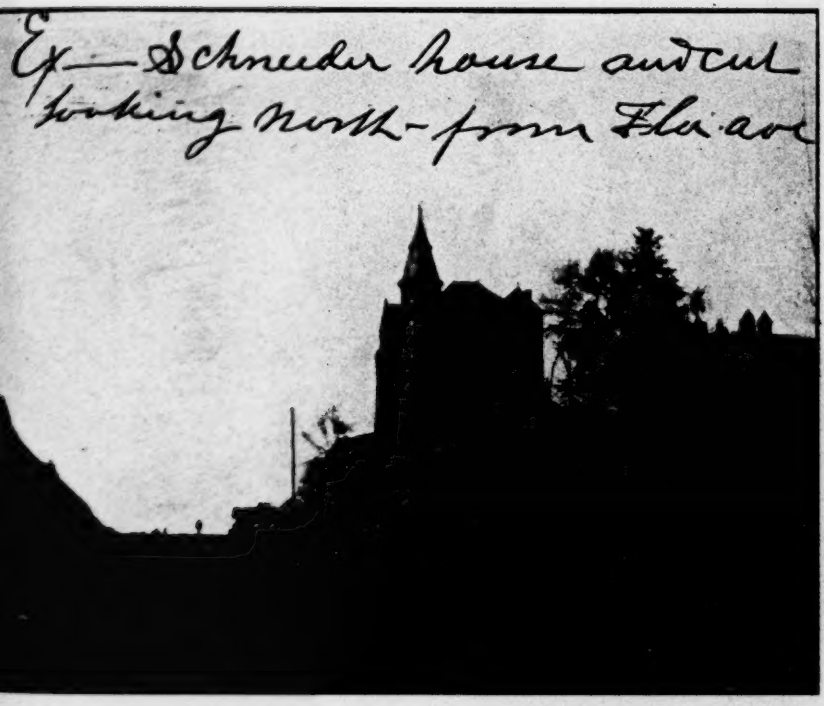
Q. Can you explain why it was that these beautiful houses did not appear on the crest of that hill. A. The Schneider house was a beautiful house and did appear there, but this other property was held as a whole and not offered in lots for sale. I have not
153 the slightest idea who is the owner of the property, except that I suppose the original owners of the property of the Sherman Estate controlled it.

Mr. SINCLAIR: They have recently incorporated to handle it.

Mr. SIMMONS: There are a great many heirs that hold an interest in the estate and have thought it best to put the title in a corporation.

And thereupon the Appellant offered the following exhibits and announced its case closed.

Ex—Schneider house and cut looking north—from Fla. ave



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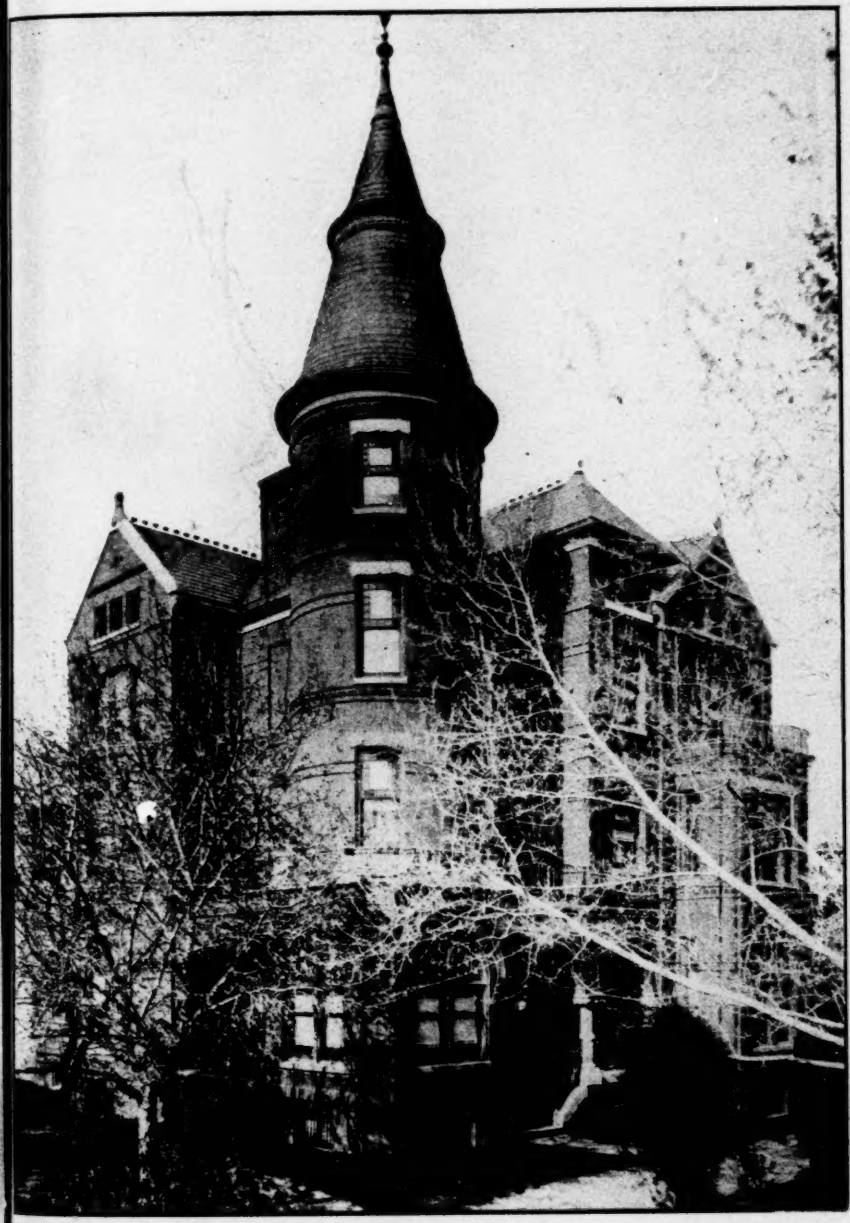


EXHIBIT A.—Schneider House.

157 MORRIS HACKER was called by the Corporation Counsel in rebuttal, who testified in substance, that he was employed by the District Government as Superintendent of Roads. At the time 11th Street was opened in 1901 he had charge of the work on the ground, direct charge of the work. That he had had considerable experience in grading, that it was his specialty. Had been engaged in it for twenty years; drew up the first specification and was the first to recommend the award for the grading of 11th Street.

Q. What was paid by the District for grading?

To which question the Appellant objected under the grounds that the price paid then was too remote and could have no bearing upon the price at the present time.

But said witness was permitted to answer over the Appellant's objection and exception.

WITNESS: The work of grading 11th Street was let by the District at 28 cents per cubic yard and that was in 1901. I judge this was a fair price. It took heavy and light grading. This land run all the way from Lydecker Avenue to Florida Avenue. The proximity of the dumping grounds has a great deal to do with the price
158 of grading in any case. If you have a through haul you can have the work done for much less than half the price of the long haul. There was a good many places for dumping earth at the time said 11th Street was opened very close to the street.

Q. Can you tell us what the grade of Clifton was east of 13th Street before 11th Street was extended? A. It had been established 200 feet east of 13th Street to the new house that was built there, the house east of Mrs. Logan's. The grading in front of the house was fixed many years ago.

Q. No grade fixed beyond that? A. It was fixed after the appropriation for grading Clifton Street which was finished up last year. The distance on Clifton Street from 13th to 11th is about 600 ft.

Commissioner OYSTER:

Q. What did it cost the District to grade Clifton Street per cubic yard? A. Forty-eight cents. There were 67,000 cubic yards cut out of Clifton Street between 11th Street and 13th Street.

The COMMISSIONER:

Q. What caused the difference in the price of this kind of work? A. The difference is entirely in the length of the haul, the material is about the same excepting the haul and the labor is slightly higher now than when our grading was done.

Q. You said the haul to the dumping grounds were near when you opened 11th Street and is not so good now? A. Yes, that enters into the difference between prices in 28 and 48 cents in my
159 opinion. The nearest dumping ground now is over in the Shutzen Park where these gentlemen are hauling their dirt now. They have to take some out at 16th and Piney Branch Road.

COMMISSIONER:

Q. The price of 48 cents is a pretty fair price for grading is it not? A. I think it is a very cheap price for this work.

Cross-examination:

Q. Mr. Hacker when did you complete the grading of Clifton Street? A. Well, it was sometime last fall.

Q. How long after you finished the grading of Clifton Street was it before the owners of Blocks 27 and 28 started in to grade their property down to it? A. It was very shortly afterwards.

Q. You said that Clifton Street was graded, 200 feet east of 13th Street before 11th Street was opened? A. Yes.

Q. And was it when they cut Clifton Street down in the past here, that they had to lower the grade of that street even the portion which had already been graded? A. That is right.

Q. They even lowered that portion 5 or 6 feet? A. Yes sir, the grade was established for the purpose of putting that house there at the right grade but the street was not graded at the time. It was not until last year.

Mr. SINCLAIR:

Q. I understood you to say that the grade of Clifton Street was established in connection with the grade of 11th Street. A. No sir, I did not say that it was. It was established in connection with the grading after appropriation of Congress which permitted
160 us to grade the street. That was a little over a year ago. I don't mean to say that the act of Congress fixed the grade of the street. It simply gave us the authority to grade it and the Commissioners used their discretion about that. It was necessary for Clifton Street to meet 11th Street on a level with the 11th Street grade.

Q. I understand that you fixed the grade of Clifton Street 200 feet east of 13th Street to accommodate some houses before 11th Street was thought of? A. Yes.

Q. That was not a permanent grade but a temporary one? A. It was fixed as permanently as the District can fix anything. The man who was building that house asked us to establish the grade some ten or twelve years ago and we did it.

ALONZO TWEEDALE was called by the Corporation Counsel as a witness and testified in substance that he was clerk in the Auditor's office of the District of Columbia in the year 1901, was a bookkeeper at the time, that he had charge of the payment of the awards for the extension of 11th Street.

Q. I wish you would tell us if you can when the awards of damages — were made to Sherman and Hoyt, the owners of Blocks 27 and 28 of Columbia Heights were paid to them.

To the question in answer the Appellant by its Counsel objected that such evidence was wholly irrelevant and incompetent but said witness was permitted to answer and the Appellant excepted.

A. The awards for damages were paid to Gen. Sherman and A. N. Hoyt August 16, 1900. They were paid grade damages amounting to $15,569 being damages to joining property in Blocks 27 and 28.

161 W. P. RICHARDS was recalled in rebuttal and testified that the cost of grading at the time 11th Street was opened was from 25 to 30 cents per cubic yard. At that time there were plenty of dumping ground around the line of 11th Street and Sherman Avenue. That the cut in the center line of 11th Street at a point opposite the line of Clifton Street was from 37 to 38 feet about 150 feet south of Clifton Street. The maximum cut was the same about 37 to 38 ft. That the grading done on 11th Street was done by tram cars. There is a great deal of difference between grading with cars and grading without them, especially when the haul is long. That 13th Street from Clifton Street South was donated by Senator Sherman some time after the original subdivision. I think 13th Street was pretty well built upon when he donated the land for that street from Clifton Street down.

And thereupon the evidence was announced as being closed on both sides.

And thereupon the paper purporting to be the verdict of the said jury was filed in said Court on the 6th day of June, 1906 in the following words:

In so far as it relates to Blocks 27 and 28.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. District Cause, No. 556.

Verdict of Jury.

We, the undersigned, heretofore summoned accepted and sworn herein as a jury to assess the benefits which have accrued to property by reason of the Extension of Eleventh Street, North-
162 west, on a straight extension of the lines thereof, with a width of ninety feet from Florida Avenue to Harvard, and thence with the same width and in a straight line to Lydecker Avenue, joining said avenue with its center line opposite the center line of Eslin Avenue, in the District of Columbia, in accordance with the provision of an act of Congress approved June 3, 1900, entitled, "An Act for the extension of Columbia Road East of 13th Street, and for other purposes," respectfully certify and show to the Court:

That after being sworn by the Court *of* the proper performance of our duties, we personally viewed and examined the land in the neighborhood of the said extension, with great care, and thereafter, at the United States Court House, in the city of Washington, in the said District, on the 28th day of March, A. D., 1906, at 2 o'clock P. M., and from time to time thereafter, pursuant to adjournment, after due notice to the persons interested therein, we met and heard

and received such evidence as was offered and submitted to us on behalf of the District of Columbia and by persons interested, touching the benefits which have accrued to the property by reason of the extension of 11th Street, as aforesaid, and upon our personal view and examination aforesaid, and the evidence aforesaid, we find that the lots, pieces, or parcels of land mentioned, set forth and described in the following schedule; and we, the jury aforesaid, find that the several lots, pieces or parcels of land set forth and mentioned in the said schedule have been benefited to the extent of the respective amounts set forth in the said schedule, and we hereby assess against the said pots, pieces, or parcels of land respectively, as and for benefits aforesaid, the several amounts mentioned, specified and set forth in the said schedule.

163 Witness our hands and seals this sixth day of June, A. D., 1906.

WILLIAM A. H. CHURCH. [SEAL.]
JAMES F. OYSTER. [SEAL.]
EDWARD GRAVES. [SEAL.]
WILLIAM V. COX. [SEAL.]
DANIEL FRASER. [SEAL.]
JOHN H. NOLAN. [SEAL.]

SCHEDULE.

Assessments for Benefits

Against lots in Columbia Heights, recorded in Surveyor's Office, Book Governor Sheperd, p. 158, as follows:

Against all that part of Lot 1, Block 28, not condemned for the extension of Eleventh Street, Columbia Heights Realty Company, owner, amount assessed as benefits.. $4000.00
Against all of lot 2, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000.00
Against all of Lot 14, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000.00
Against all of lot 15, Block 28, Columbia Heights Realty Company, owner, amount assessed as benefits..... $2000.00
Against all that part of lot 16, Block 28, not condemned for the extension of 11th Street, Columbia Heights Realty Company, owner, amount assessed as benefits.. $5000.00
Against all that part of lot 1, Block 27, not condemned for the extension of Eleventh Street, Columbia Heights Realty Company, owner, amount assessed as benefits.. $1500.00
Against all of lot 2, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1500.00
Against all of lot 3, Block 27, Columbia Heights Realty Company, owners, amount assessed as benefits..... $1000.00
Against all of lot 4, Block 27, Columbia Heights Realty Company, owners, amount assessed as benefits.. $1000.00
164 Against all of Lot 5, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits ..... $600.

Against all of Lot 6, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $400.
Against all of Lot 25, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $400.
Against all of Lot 26, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $600.
Against all of Lot 27, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000.
Against all of Lot 28, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1000.
Against all of Lot 29, Block 27, Columbia Heights Realty Company, owner, amount assessed as benefits..... $1500.
Against all that part of Lot 30, Block 27 not condemned for the extension of Eleventh Street, Columbia Heights Realty Company, owner, amount assessed as benefits.. $1500.

And thereupon the Appellants appeared and filed the following exception and objection to the confirmation of said verdict:

In the Supreme Court of the District of Columbia, Holding a District Court.

No. 556.

In re EXTENSION OF 11TH STREET.

Now comes the Columbia Heights Realty Company, owner of Lots 1, 2, 14, 15, and 16 in Block 28, and Lots 1 to 6 and 25 to 30 in Block 27, not waiving any plea or exception heretofore interposed or taken by it to the proceeding in said cause, and objects to the confirmation of the verdict returned in this case on June 6, 1906, whereby the property of your respondent has been assessed for alleged benefits, and moves to vacate and quash same, for the following reasons:

First. Because this case has not been proceeded with in this Court in accordance with the opinion and mandate of the Court of Appeals, and this Court was without jurisdiction to proceed otherwise than directed.

Second. Because the petitioners have taken and perfected in this case two appeals to the Court of Appeals from final orders passed herein, neither of which has been disposed of, and this court was without jurisdiction to proceed in the matter pending said appeals.

Third. Because this respondent has interposed a plea of
165 the Statute of Limitations in bar to any proceeding in the case, which plea is yet undisposed of, and the same should have been considered and sustained by the Court.

Fourth. Because a former jury summoned in this case, found the respondent's property above referred to, damaged by reason of the extension and opening of said 11th Street, and the verdict of said former jury was confirmed by this Court and became a final judgment; and respondent has pleaded said former judgment and finding

in bar to further proceeding in said case, and said plea is yet undisposed of, whereas the same should have been considered and sustained.

Fifth. Because the men constituting the alleged jury which returned said verdict were not selected and summoned as required by any law in relation to the proceedings, and your respondent by its counsel, before said verdict was returned, and as soon as the fact was known, moved to discharge said jury on the grounds named; said jury was therefore illegally constituted and the Court without jurisdiction to proceed in the matter, and therefore said verdict is void.

Sixth. Because said alleged jury was not sworn by the Court,

That they are nor interested in any manner in the land to be assessed, nor in any way related to the parties interested therein; and that they will, without favor or partiality, to the best of their knowledge assess the benefits resulting from the extension of said Eleventh Street herein provided etc.

as required by the statute; but said alleged jury was simply sworn "to assess the benefits according to the statutes" without any other words of qualification, which oath did not advise them of the duty to be performed. Your respondent's Counsel undertook to inquire of said jury if any one of them were interested in the property to be assessed or related to the parties interested therein, but the Court refused to allow any answer to said question, ruling that the question should have been asked before the jury was sworn; but as it was the duty of the Court to make such inquiry, respondent through its attorney, excepted to said ruling.

Seventh. Because of errors committed by the judge in giving instructions on behalf of the petitioners over the objection of your respondent, and, in refusing to grant certain instructions on behalf of your respondent, to all of which exceptions were duly taken.

Eighth. Because the verdict as returned by said alleged jury was wholly in disregard of the evidence and disregard of the instructions of the Court. And because said verdict is contrary to the evidence in the case, and is without regard to the rights of the respondent, and is wholly unjust and unreasonable. And because said jury refused to admit competent evidence offered on behalf of this respondent, and admitting incompetent evidence in favor of the petitioners. And because said jury or certain members thereof, secretly and without the authority of the Court ascertained the sums the former jury in this case undertook to aportion against the property abutting said street, and the amounts so apportioned, which was wholly irrelevant to the issue in this case, was thereby made known to said jury and they well know it was not proper for them so to do.

Ninth. Because said verdict as returned was not prepared by the jury as required by law, and because said jury did not pre-
166 pare and return its verdict to the Court as required by law. And because said verdict is not signed by the jury as required by law.

Tenth. The respondent further shows unto the court that Lots 14 in Block 28 and lots 25 and 26 in Block 27 are not within 200

feet of 11th Street, the area limited by the statute in which benefits might be assessed, and therefore said jury was without authority to assess anything against said lots and said assessment is therefore illegal and void.

Wherefore and by reason of the premises and because your respondent's property was greatly damaged by the extension of said street, it objects to the confirmation of said verdict and moves that the same may be held void and of not effect and that such of its pleas that may appear to be well taken may be sustained and the cloud removed from its title.

Respondent prays leave to introduce in this case to be used in support of this motion and its exceptions, the transcribed notes of the evidence taken before said jury at its hearing; and to introduce such other evidence as may be found proper and competent to support the exceptions and questions of fact in relation to the several questions raised hereby.

Before the time fixed for the hearing of the said exception and objection and the motion by the District of Columbia to confirm the verdict of the said jury, the Appellant filed 17 affidavits, the first by Robert E. Bradley as follows:

DISTRICT OF COLUMBIA, *ss:*

Personally appeared Robert E. Bradley and being duly sworn, says that he is a resident of the District of Columbia, and has been engaged in business as a real estate broker, making sales of property and loans on same in all parts of the said District, especially in the subdivision known as Columbia Heights and property adjacent thereto, for the past 20 years.

That for the past 6 or 8 years land values in said section have greatly depreciated; yet for the past ten years the property in the subdivision has been rapidly developed by the erection of houses, improvements of streets, etc. That owing to the continued building operations which have been going on in the subdivision, and the great change in said section, caused thereby, and on account of the improvements of the cross streets in said neighborhood and the extension of the car line out 11th Street; that in his opinion
167 it would be absolutely impossible for any human being to calculate now or any part of the years 1905 or 1906, with any degree of accuracy, to what extent if any the laying out or extending of said 11th Street has benefited the land abutting the said street, or any property in its vicinity. That any sum levied upon said property within the past year, which required a calculation of such benefits, must necessarily have been guess work.

R. E. BRADLEY.

Subscribed and sworn to before me this 22 day of January, 1907.

James E. Ellerson, who had been engaged in business	12	years
William S. Minnix, " " " "	10	"
Phelan C. Hawn, of the firm of Lieberman & Hawn,	12	"
Victor Anderson, who had been engaged in business,	10	"
James S. Lampton, " " " "	10	"
L. S. Lipscomb, " " " "	10	"
Frank T. Rawlings, " " " "	20	"
A. T. Hensey, " " " "	15	"
George Henderson, " " " "	20	"
S. M. Jones, " " " "	20	"
H. Clay Stewart, " " " "	20	"
H. Rozier Dulaney, " " " "	15	"
W. S. Rust, " " " "	15	"
Charles P. Stone, Pres. of the Stone & Fairfax R. E.	18	"
William A. Hill, Pres. of the Moore & Hill R. E.	12	"
W. H. Saunders, Proprietor of the W. H. Saunders R. E.	16	"

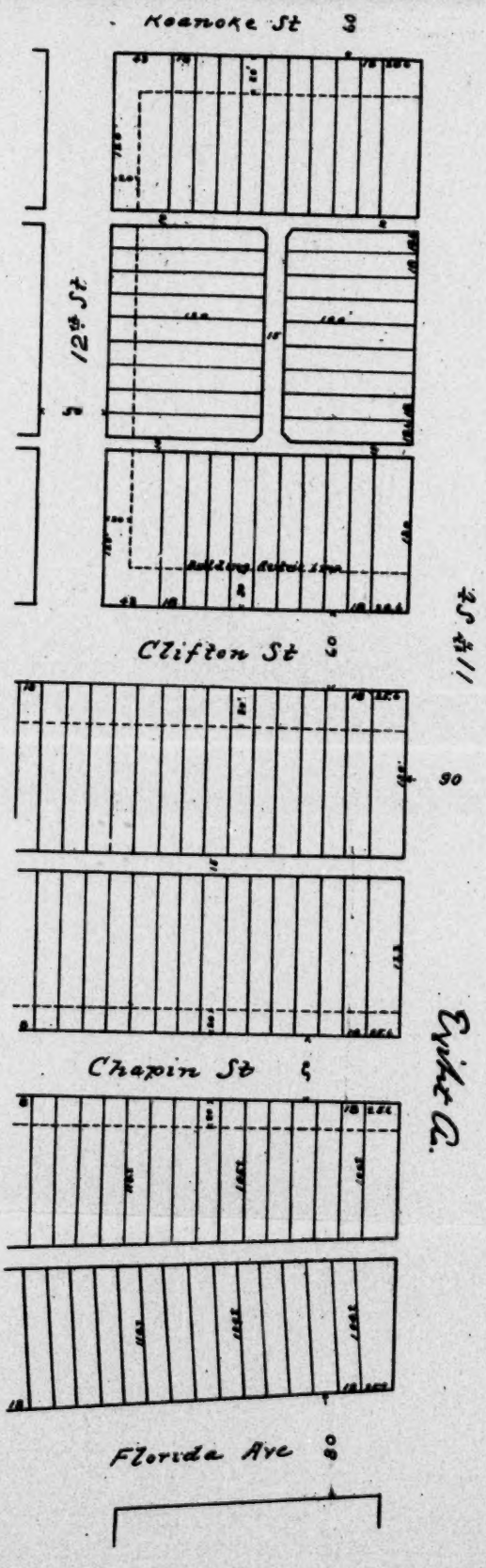
All of whom made affidavits similar to the one made by the said Robert E. Bradley, aforesaid, excepting that the time they had been engaged in business varied as herein stated.

And before the motion to confirm said verdict was heard the appellants filed the following affidavit made by D. J. Howell with a plat attached thereto as set forth in said affidavit.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared D. J. Howell, and being duly sworn says that he is a Civil Engineer engaged in business in the District of
168 Columbia, and has been engaged in business for the last twenty years. That in September, 1905 he was engaged by the Columbia Heights Realty Company (whose members affiant is informed are composed of the heirs and devisees of the late John Sherman and A. M. Hoyt), to cross section and superintend the grading of part of squares 27 and 28 in the subdivision known as Columbia Heights. That said work was begun sometime in December, 1905 and was completed about the first of January, 1907, that is to say, said block 28 has been brought down to a terrace of six feet above the grade of 11th Street and five feet above the grade of Clifton Street, and Block 27 to a terrace of five feet above the grade of 11th Street and five feet above the grade of Clifton Street.

That the grading of said land was made necessary to the deep cut through same in extending of 11th Street. That the grading of said land cost company $52264.80 and other expenses incidental thereto such — my superintendence and attorney's fees for preparing papers in relation to the contract was $2500.00, making the amount paid out by said company on account of said grading $54764.80. Affiant further says that had it not been necessary to cut said 11th Street down about 30 feet at the N. E. Corner of Block 28 so as to make an easy moderate grade for the 11th Street car line and other public use, that is to say, if said street had been cut down at said point to the extent of 10 or 12 feet only (which would have been


Roanoke St
12th St
Clifton St
Chapin St
Florida Ave
90
Exhibit C.

sufficient for the use of light vehicles) comparatively but a small amount of grading would have been necessary to place the land referred to in said blocks in good condition for building purposes. That he has prepared a plan for a subdivision of said land, which will be placed in file in the Surveyor's Office of the District of Columbia as soon as the question of building lines can be ad-
169 justed and the copy hereto attached, of the east portion of said square shows how said land is intended to be subdivided.

D. J. HOWELL.

Subscribed and sworn to before me this 28th day of January, 1907.

M. S. W. DAY,
Notary Public.

(Here follows Exhibit A, plat, marked p. 170.)

171 And thereupon on the morning of the hearing of the exceptions and motion to confirm*ed* as aforesaid, the Appellant summoned and produced the jurymen who had sat in said case and in support of his motion to vacate the verdict, offered to prove by the said jury that the papers purporting to be the verdict of said jury was not prepared by them but were made up from notes made by the said jury and handed to the Corporation Counsel, that the paper purporting to be the verdict of said jury was prepared in the office of the corporation counsel and not by the jury and that it was handed back to the said jury and signed by them without any reference to their notes and without comparing the same with their notes.

Counsel further proposed to show by the members of the said jury that neither of them had been summoned by the United States Marshal and that they had not been interrogated and asked questions whether or not they were employed by the District of Columbia or the United States or were interested in the property to be assessed or related to any one interested at the time. The Court refused to allow any one of said jurors to be sworn or examined in relation to the facts set forth, or allow the Appellants to prove said facts by said jurors and the Appellants by their counsel excepted to said ruling.

And thereupon the Court having refused to permit the Counsel to interrogate said jurors and at the Court's suggestion the following affidavit was sworn to and filed in the case.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF ELEVENTH STREET. District Court, No. 556.

William B. Robison, being duly sworn, deposes and says that he is the chief Deputy Marshal for the District of Columbia, and that

several weeks before the receiving *the* of the order from the
172 Supreme Court of the District of Columbia to summons a jury to assess the benefits in the Extension of Eleventh Street, which order was passed on the 9th day of February, 1906, he had frequent conferences with the Marshal as to the composition of said jury, and together with the Marshal canvassed some twenty-five or thirty names some of which were names suggested by him and some by the Marshal; as a result of these frequent conferences on the subject the following names were selected by the Marshal to constitute said jury: John E. Herrell, W. A. H. Church, James F. Oyster, Daniel Fraser, William V. Cox, John H. Nolan and Edward Graves. While it is true that the jurors aforesaid were finally selected by the Marshal from the entire list under consideration affiant cannot at this time say which of said names were suggested by him and which by the Marshal although he is satisfied some of these names were names submitted to the Marshal's consideration by him; affiant further states that the form of summons used to notify said jurors of their selection was framed by the affiant, and the Marshal's name was signed to said summons by the affiant; the affiant also says that the said notices were served upon the aforesaid jurors by the various deputy Marshals in accordance with the practice of the Marshal's Office in common law cases.

WILLIAM B. ROBISON,
Chief Deputy Marshal.

Subscribed and sworn to before me this 31st day of January, 1907.

J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
Ass't Clerk Supreme Court District of Columbia.

173 The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the Court. After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellant, in support of its motions and exceptions, offered to read to the Court the said testimony but the Court declined to hear the same or consider it at the time in full, Counsel saying that it would be his purpose to consider the same if the Court found, after consideration, the propositions of the law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence, or hearing it fully read, the Court passed an order overruling all the exceptions, and confirming said verdict and refused to consider said testimony any further, and the appellant excepted.

And thereupon the appellant presented to the Court, the justice who presided at the hearing in this case and made the rulings herein referred to, this its bill of exceptions containing the proceedings before the Court and before the jury or commission with the substance of the evidence taken before the said jury, and the affidavits filed in the case subsequent thereto, as herein referred to, with the

exceptions as therein noted, which were duly taken by the appellant separately, in the order in which they appear, and allowed by the Court at the time.

And the said appellant by its counsel prays the Court to sign and seal this its bill of exceptions and make the same a part of the record in this case, which is now accordingly done, and the said bill of exceptions is here now signed and sealed in due form and made a part of the record in this case this 14th day of August, 1907, *nunc pro tunc*.

JOB BARNARD, *Justice*.

174 *Appellant's Directions to Clerk for Preparation of Record.*

Filed August 21, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556, District Case.

John R. Young, Clerk.

You will please prepare the record for the Columbia Heights Realty Co., for its appeal in this case and in so doing you will include the following papers which constitute the record on said appeal.

1. The original petition filed on the 31st day of May, 1899, and plat accompanying therewith.
2. Instructions granted on behalf of the property owners in relation to damages to adjoining property, filed in the case on January 10, 1900.
3. Instruction asked by the petitioners and refused by the Court, filed in the case on January 10, 1900, in relation to allowances of damages to adjoining property.
4. Verdict of the jury filed in the case on the 20th day of February, 1900, in so far as it relates to the lots in Blocks 27 and 28, Columbia Heights.
5. The exceptions of John Sherman and A. M. Hoyt to said verdict filed in the case June 28th, 1900.
6. The decree passed on the third day of July, 1900, confirming the awards and vacating the assessments.

175 7. Notation of appeal by petitioners to the Court of Appeals.

8. Mandate of the Court of Appeals filed July 22, 1903.
9. Order passed March 4, 1904, denying motion of petitioners for confirmation of assessments.
10. Order passed June 17, 1904, directing proceedings under act of June 6, 1900.
11. Motion for dismissal of suit, in relation to order of June 17, 1904, by Abner Greenleaf, *et al.*, found in the papers of the case and not marked filed.

12. Affidavit of Leo Simmons with a letter of Justice Gould attached, filed in the case the 9th day of August, 1904.
13. Amended and supplemental petition filed in the case the 9th day of August, 1904.
14. Order of publication passed on the 27th day of October 1904.
15. Verdict of Jury of Seven filed June 6, 1906.
16. Plat filed before second jury of seven in the last trial.
17. Order June 6, 1907 overruling exceptions and confirming the verdict.
18. Notation of appeal and order fixing bond.
19. Appeal bond approved.
20. Order extending time for settling bill of exceptions.
176 21. Order extending the term.
22. Bill of exceptions and order making same part of the record.

LEO SIMMONS,
Att'y for Appellants.

Appellees' Directions to Clerk for Preparation of Record.

Filed August 27, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In Re THE EXTENSION OF 11TH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. No. 556. District Court.

Designation by Appellee of papers to be included in Transcript of Record on the appeal of Columbia Heights Realty Company.
Original petition of Commissioners, D. C., filed May 31, 1899.
Verdict of jury of Seven filed February 20, 1900, in so far as it relates to Blocks 27 and 28, Columbia Heights Subdivision; both awards and assessments.
Exceptions of Hoyt and Sherman, filed June 28, 1900.
Order of Judge Bingham of July 3d, 1900, confirming verdict in part and vacating it in part.
Mandate of Court of Appeals filed July 22, 1903.
Order vacating decree so far as it vacates assessments, and overruling motion to confirm, March 4, 1904.
177 Order for jury of 12, March 4, 1904.
Motion of Abner Greenleaf, June 17, 1904.
Order directing further procedings in accordance with the Act of June 6th, 1900 June 17, 1904.
Amended and supplemental Bill, August 9, 1904.
Proof of publication of Bill.
Order warning interested parties to appear, October 27, 1904.
Order directing Marshal to summon jury, February 6, 1906.
Order accepting and directing Jury, March 16, 1906.

Verdict of 2d jury as to Blocks 27 and 28, Columbia Heights, July 6, 1906.

E. H. THOMAS,
JAMES F. SMITH,
A. LEFTWICH SINCLAIR,
Counsel for Appellees.

178 *Order Extending Time in Which to File Transcript of Record.*

Filed September 12, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556, District Case.

Upon motion of the Columbia Heights Realty Company, it is this 12th day of September, 1907, ordered, that the time for filing transcript of the record in this case, in the Court of Appeals, be, and the same is hereby, extended to and including the 1st day of October, 1907.

It is further ordered that the said Columbia Heights realty Company be, and it is hereby, allowed to prosecute a separate appeal in this case.

ASHLEY M. GOULD, *Justice.*

179 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 178, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made parts of this record, in cause No. 556, District Court Docket, In the Matter of the Extension of Eleventh Street, Northwest, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of September, A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1833. Columbia Heights Realty Company, appellant, *vs.* Henry B. F. Macfarland, *et al.* Court of Appeals, District of Columbia. Filed Sep. 30, 1907. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND et al., Commissioners of the District of Columbia.

Now come the appellees herein, the Commissioners of the District of Columbia, and suggest to the Court that certain papers comprised in the record of this cause in the Supreme Court of the District of Columbia, and material to the hearing of this case on appeal, have been omitted from the transcript of the record herein filed, and the said appellees move the Court to issue a writ of certiorari to the Supreme Court of the District of Columbia directing the certification to this Court of a transcript of the following papers:—

1. Motion to dismiss petition of August 9th, 1904, filed February 6th, 1906.
2. Motion to strike out petition of August 9th, 1904, filed February 6th, 1906.
4. Motion to strike out petition of August —, 1904, filed February 6th, 1906.
6. Docket entries for February and March, 1906.
7. Cross examination of Harold E. Doyle, pages 10 to 18 inclusive of the depositions filed as an affidavit January 29th, 1907.
8. Testimony of William P. Richards, pages 113 to 128 of said depositions.
9. Testimony of Thomas W. Smith, pages 128 to 134 of said depositions.
10. Testimony of Roland C. Booth, pages 456 to 469 of said depositions.
11. Testimony of John L. Weaver, pages 507 to 510 of said depositions.
12. Testimony of Alonzo Tweedale, pages 652 to 655 of said depositions.

J. F. SMITH,
Attorney for Appellees.

I, James Francis Smith, being duly sworn, depose and say:—That I am counsel for the aforesaid appellees, and that the above mentioned papers are in my judgment material and necessary to the fair trial of this cause on its merits, and that the suggestion is not made for delay.

JAMES FRANCIS SMITH.

Subscribed and sworn to before me this 24th day of January, A. D., 1908.

A. LEFTWICH SINCLAIR,
Notary Public, D. C.

(Endorsed:) No. 1833. Columbia Heights Realty Company vs. Macfarland et al. Suggestion of diminution of record and petition for certiorari. Court of Appeals, District of Columbia. Filed Jan. 24, 1908. Henry W. Hodges, Clerk.

FRIDAY, *January 24th*, A. D. 1908.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

The suggestion of a diminution of the record and petition for certiorari in the above entitled cause was submitted to the consideration of the Court by Mr. J. F. Smith, of counsel for the appellee, in support of petition, and by Mr. Leo Simmons, in opposition thereto.

TUESDAY, *February 4th*, A. D. 1908.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

On consideration of the petition for the allowance of the Writ of Certiorari in the above entitled cause, It is by the Court this day ordered that said petition be, and the same is hereby, denied.

WEDNESDAY, *March 4th*, A. D. 1908.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

and

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

The argument in the above entitled causes was commenced by Mr. Samuel Maddox, attorney for the appellants in No. 1815, and was continued by Mr. Leo Simmons, attorney for the appellant in No. 1833.

THURSDAY, *March 5th*, A. D. 1908.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

and

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

The argument in the above entitled causes was continued by Mr. Leo Simmons, attorney for the appellant in No. 1833, and by Mr. J. F. Smith, attorney for the appellees, and by Mr. Samuel Maddox, attorney for the appellants in No. 1815, and was concluded by Mr. Leo Simmons, attorney for the appellant in No. 1833.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is a proceeding for the condemnation of land for the extension of Eleventh street, N. W., in the city of Washington, from Florida avenue northward to Lydecker avenue, begun by a petition filed by the Commissioners of the District, in the Supreme Court of the District, on May 31, 1899.

The proceeding was commenced under the authority of an act of Congress, approved March 3, 1899.

A jury of seven men was summoned, and after hearing returned a verdict on February 20, 1900, assessing damages for the lands taken and damaged, as well as benefits, to the extent of one-half of the total damage, against certain lots within the boundaries created by the act, on account of the opening of the street. Exceptions were filed to this verdict by John Sherman and A. M. Hoyt, so far as it assessed benefits against their property. As is shown by other appeals, other owners also excepted. July 3, 1900, one of the justices of the Supreme Court of the District confirmed the report or verdict as to

damages for the lands taken, and set it aside as to the benefits assessed. The order declaring the assessment of benefits void was in pursuance of a decision of this court in another condemnation case of Davidson v. Wight, 16 App. D. C., 371. The Commissioners appealed from the decision so far as it vacated the assessment of benefits in a case entitled MacFarland v. Byrnes et al. While the case was depending an appeal to the Supreme Court of the United States reversed the decision in Davidson v. Wight, see 181 U. S., 371. In accordance with this last decision as regards the legality of the assessment of benefits, the order vacating the verdict as to benefits was reversed, July 22, 1903, and the cause remanded for further proceedings. MacFarland v. Byrnes, 19 App. D. C., 531.

On March 4, 1904, upon consideration of the mandate of this court, and a motion of the Commissioners to confirm the said verdict, the court overruled the motion and entered an order vacating the assessments, and directing that the Commissioners might apply within a reasonable time for a jury of twelve to make another assessment. This followed the rule laid down by this court in construing the provisions of the act of March 3, 1899, as the proper one where exceptions had been made and not withdrawn. See Brown v. MacFarland, 19 App. D. C., 525.

On June 17, 1904, a motion was filed by the attorney representing the appellants in this case, and other owners, and by Samuel Maddox representing some other land owners, to dismiss the suit "as to any further proceedings in this cause, because the law under which such proceedings must be had has been repealed;" and, second, for the failure of the Commissioners to proceed as required by the order of March 4, 1904. The act referred to as repealing the Act of March 3, 1889, is that of June 6, 1900 (31 Stat., 665, sec. 12). That was an act for the extension of Columbia road and for other purposes. Section 12 of that act made its sections 3, 4, 5, 6, 7, 8, and 11 applicable to the former act for the extension of Eleventh street. These sections provided a somewhat different procedure from that of the former act. Section 6 provided that in case the verdict or award shall be vacated a new jury shall be summoned, which jury is named in section 4 as consisting of seven men. Section 8 corrected the omission of the former act to provide time for payment of the installments of benefits assessed, and permitted amendments of petition, process, records, proceedings, and descriptions of property. Section 12, in addition to making other sections applicable as aforesaid, authorized the District Commissioners to apply for the final ratification of the awards made for extension of Eleventh street, and concluded thus: "And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this act." On the same day that the motion above recited was filed, June 17, 1904, it was ordered by the court: "Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others," on that day, that the petitioners in the above entitled cause,

within sixty days from the date hereof proceed in the matter of the reassessment of benefits herein in accordance with the terms and provisions of the act of Congress approved June 6, 1900.

On August 9, 1904, the Commissioners filed an amended and supplemental petition in which they stated briefly the previous proceedings in the case, including the order aforesaid, and prayed for notice to be given, and the appointment of a new jury of seven to reassess the said benefits. After publication of notice the new jury was impanelled which thereafter proceeded to view the property and hear evidence. Their verdict or award was filed June 6, 1906. The appellants filed exceptions to the award and moved to vacate it upon several grounds which will appear later.

On February 5, 1907, Leo Simmons, as attorney for the objectors and present appellants, filed an affidavit, relating to the motion heretofore recited that had been signed by him and other counsel, and on which the order to proceed under the act of June 6, 1900, was founded, in which he stated that he had served a copy of said motion upon opposing counsel, but did not file the original, intending to file it at the hearing; that opposing counsel came into court on the day as notified, and had with him an order prepared, expressing his willingness to proceed in accordance therewith; that he, Simmons, objected to the said order being signed; that no hearing was had, and the question whether or not proceedings should be had under the act of 1900 was not argued; that the justice suggested that any objection he might wish to make could be taken advantage of in the future; that affiant asked that notice be given of the amended petition, which was promised, and nothing more was said. The justice signing the order did not hear the case on the final proceedings. He gave a certificate, which was filed with the affidavit, to the effect that his recollection was that when he signed the order there was no discussion as to the act under which procedure should be pursued; and that he had no remembrance of Mr. Simmons consenting to the order.

It appears from the bill of exceptions that in February, 1906, the appellants moved to strike out the amended and supplemental petition filed August 9, 1904, because filed without authority of law, because not in accordance with the former order, and because if the proceeding is to be prosecuted under the act of June 6, 1900, it must be a new one. The motion was overruled and exception noted.

This motion was renewed and again denied March 6, 1906. The appellants then filed a plea to said petition of the bar of the Statute of Limitations, because the right asserted therein did not accrue within three years next before filing the same. Another plea alleged that the former adjudication had settled the right to the assessment of benefits adversely to the claim of the petitioners. It further appears that notice to the seven jurors, signed by the marshal, had been served by his deputies upon each of them. Next appears an order of the court impanelling the jurors as summoned, and directing them to proceed with the assessment under the provisions of the act of June 6, 1900, as had been before determined. Notice was given to the counsel for appellants, which contained the names of the jurors

selected of the date set for impanelling the jury, but he failed to appear before the same was done. Whether counsel for other interested parties were present does not appear. The jurors appeared and without being examined as to their qualifications were regularly sworn. After the jury had been impanelled and sworn, counsel for appellants undertook to examine them as to their qualifications, and excepted to the denial of his right. At the request of the petitioners the court gave the following instructions to the jury:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street, northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining amounts to be so assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from said extension of Eleventh street. By extension of the street the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare or highway."

Appellants excepted to this instruction on the ground that the extension could not mean the completion of the street for all ordinary purposes of a public highway; that the jury had no right to assess benefits beyond the line of 200 feet from the street to be opened.

The court then proceeded to further instruct the jury as follows:

"1. The jury are instructed that in ascertaining whether any benefit has accrued to any piece or parcel of land abutting upon or within the vicinity of Eleventh street extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of said street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto, the jury must find that the benefits upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by extension of car line in said street.

"2. The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case, unless they find the property so assessed actually benefited by enhancement in value and that such benefit accrued immediately from the extension of the street in question.

"3. And in establishing such benefits, in case they shall find any, they shall take into consideration the damage done to any piece or parcel of land abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find any piece or parcel of land benefited by laying out and opening of said street, and shall also find that by reason of the grade of said street being fixed at a point much below the level of such ground, and that such ground by reason thereof is left far above the said street grade, so as to cause damage on account of grading same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accru-

ing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits and the damages caused by change of grade in extension of said street, the jury should take into the amount allowed, if any, for damages, by reason of such change of grade, by the former jury which assessed damages.

"4. The jury are instructed that they are not at liberty to levy any assessment against any piece or parcel of land abutting upon or adjacent to said Eleventh street, unless they find such piece or parcel of land benefited by actual enhancement in value immediately upon the opening and extension of said street, and in considering whether or not any piece or parcel of land has enhanced in value, they have no right to consider any increase or enhancement in value that is the result of any special improvement made upon the street after it was opened and established, as previously stated, neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh street."

The appellant offered the following prayers for instructions, which were refused:

"1. The jury are instructed that in ascertaining whether or not any benefit has accrued to any piece of land abutting upon Eleventh street extended, or in the vicinity thereof, they shall not take into consideration any benefit which they may find had accrued to such land subsequent to the laying out and establishing of said street. That is to say, that in laying assessments for benefits, if the jury shall find any, they shall not take into consideration the grading or paving of the street, nor any improvements or street-car facilities thereon subsequent to the laying out of the street. In other words, the jury must find that the benefit upon which an assessment was based, was the direct result of laying out and establishing the street, and not the result of improvements since made, either in or upon the street itself, or abutting upon nearby lands.

"2. Such special improvements as water-mains, sewers, curbs, gutters, and sidewalks are usually assessed in other proceedings, and, of course, any enhancement in value arising from that character of improvement and the macadamizing of the street in question, or any street crossing the same should not be taken into consideration as a basis of benefit in this case.

"3. The said jury is further instructed that in estimating what benefits, if any, have accrued to any piece or parcel of land abutting upon or adjacent to said Eleventh street, they are not at liberty to take into consideration any enhancement in value or benefit that has been given or accrued to such land by the grading of such street nor macadamizing the roadway of the same; nor have they the right to base their assessment for benefits upon any enhancement in value, if they find any, brought about by the laying of sidewalks, sewers, water-mains, gutters and curbs, that have been placed in or upon said street; their sole right to levy an assessment against any piece or parcel of land must be founded upon such benefits, if any, as have accrued to the land from the extension of the street only. And what is meant by extension is the condemnation of the land for public uses and locating said street by demarcations and bound-

aries and placing same upon the maps and plans of the District of Columbia as a public highway.

"4. The jury is instructed that what is meant by 'benefits,' is not such benefits as accrue to the public generally; but such benefits as will actually enhance the value of the property; and if from the evidence they find that any piece or parcel of land abutting upon said street or adjacent thereto has depreciated in value since the extension of said street, instead of enhancing it or increasing it in value, then they are not at liberty to levy any assessment against same.

"5. The jurymen are further instructed that the burden is upon the petitioners, the Commissioners of the District of Columbia, to satisfy you that any piece or parcel of land has in fact been benefited by enhancement in value from the extension of said street. That every presumption of law growing out of their proceedings should be resolved in favor of the person whose land is liable to assessment. And therefore if any doubt should be met with, caused by reason of delay in prosecuting these proceedings, as to whether or not any piece or parcel of land was in fact benefited by the extension of said street and at the time it was extended, such doubt should be resolved in favor of such property owner and against the District of Columbia."

Appellant then moved the court to discharge the jury, because the members thereof had not been selected and summoned as required by law. This was overruled. The bill of exceptions then proceeds to recite: "The following, purporting to be the substance of the evidence before the jury, which evidence was presented to the court in the form of an affidavit by the stenographer, after the verdict was returned and exceptions being heard." This is followed by a statement of evidence as disclosed by said affidavit, together with certain other affidavits relating to other proceedings in the case.

The concluding recital of the bill relating to this evidence, reads as follows:

"The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court. After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellant, in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence, or hearing it fully read, the court passed an order overruling all the exceptions, and confirming said verdict and refused to consider said testimony any further, and the appellant excepted."

The bill of exceptions also recites the objections of the appellant to the confirmation of the award or verdict. It is unnecessary to

repeat these as such of them as are relied on will appear on the assignment of errors.

1. The first error assigned relates to the action of the court in ordering the proceeding to be continued under the provision of the act of June 6, 1900, instead of under the act of March 3, 1899.

The substantial difference between the two acts is that the former would require the new assessment to be made by a jury of twelve, while the latter limits the number to seven. The second, responding to a suggestion made by the court in Todd v. MacFarland (20 App. D. C., 176, 184), cures the defect in the former relating to the payment of the assessed benefits in certain installments. The latter contains no limit of the area of assessment while the former does.

We regard it as unnecessary to consider whether the later act was intended to supersede the former entirely as regards the reassessment of benefits under the proceeding pending when the same was approved. The appellant and others interested were apparently of the opinion that it did so, as is shown by their motion of June 17, 1904. The opposing parties accepting that view as correct, the court made the order on that day, and the proceedings were continued in accordance therewith, resulting in the verdict returned June 6, 1906, the confirmation of which is the subject of the appeal. No objection was raised to the new order of procedure until a late hour in the proceedings. The objection appears for the first time in the affidavit of Leo Simmons, filed February 7, 1907, which is recited in the preliminary statement of the case. This affidavit, which does not appear to have been acted upon by the court, unless it may be embraced in the final act of confirmation, fails to show that the order of procedure was not his own conception, or that the motion had not been in fact filed. But were it more definite in its statement, it can not be received to contradict the record. Having suggested the procedure under the later act and carried on the litigation, without objection, in accordance therewith, the appellant is estopped to object to the verdict on the ground alleged. Having made his election he is bound by it. Iron Gate Bank v. Brady, 184 U. S., 665, 668; Davis v. Wakele, 156 U. S., 680, 689; Robb v. Vos, 155 U. S., 1, 43; Clark v. Barber, 21 App. D. C., 274, 280.

2. The second assignment of error is that, "the court erred in proceeding in this case after an appeal was noted by the appellees from the order passed on the 4th of March, 1904, and from the decree of March 9, 1906. The first appeal referred to is based on the recital of the order of March 4, 1904, in which the court, after the filing of the mandate in this court, overruled a motion of the petitioners to confirm the verdict of the first jury. The order recites that they excepted and prayed an appeal. This order was in accordance with the mandate aforesaid. Whether it could have been appealed from or not is immaterial, as it is plain that no attempt was made to prosecute one. It is true the Commissioners were not required to give an appeal bond, but other steps were necessary. Instead of taking these, they showed that the intention had been abandoned, by coming in and filing the amended petition and prose-

cuting the proceeding. The record does not show the second appeal referred to. The assignment of error is without merit.

3. The third assignment relates to the failure of the court as charged to examine the jurymen, and in refusing permission to the counsel for appellant to examine them touching their qualifications. Counsel had notice of the time when the jury was impanelled and the members sworn, and could have had the opportunity to examine them and present his objections, if any, to each one. His request to examine them afterwards came too late. He made no objection to any one of them.

4. The fourth assignment of error is: "The court erred in refusing to discharge the jury on motion of appellant's counsel." This motion, referred to in the preliminary statement, was overruled March 31, 1903.

This motion came too late also. If there was any irregularity in the selection and summons of the jury, it should have been raised before they were impanelled and sworn. Moreover, the record fails to show that the jurors were not regularly selected and summoned by the marshal. It appears therefrom that each member selected was notified, by notice signed by the marshal, on February 9, 1903, of his selection, and commanded to appear for service. In support of his motion he filed an affidavit of William B. Robison, chief deputy marshal, to the effect that he had conferences with the marshal concerning the selection of jurors, and that some of the persons selected were suggested by him. He was unable to say what jurors were suggested by him, but he added that the jurors were finally selected by the marshal from the entire list under consideration, and the notices regularly served. Assuming that this affidavit might be considered, without so affirming, all that appears therefrom is that the marshal canvassed a list of names with his chief deputy, and then made his selections. There is nothing illegal or improper in the marshal's conduct. The selections were his.

5. The fifth assignment is that: "The court erred in not hearing and sustaining appellant's plea of the Statute of Limitations."

We perceive no error in denying the effect of the plea of limitations. The proceeding was a continuous one; the amended and supplemental petition was no departure from the case originally begun. It was filed as a continuation of the same proceeding under the later statute, in obedience to the order of the court founded on appellant's motion, embodying the view that the further proceedings could be had only under the later act. Moreover, the amended petition of August 9, 1904, was filed within three years after the mandate of this court had been transmitted, on January 22, 1903. And it was not until March 4, 1904, that the order was entered refusing to confirm the assessment of benefits made by the first jury. It is questionable, also, whether there is any limitation in such proceedings unless imposed by the condemnation act itself.

6. The sixth assignment is that: "The court erred in not hearing and sustaining appellant's plea of res adjudicata."

This plea was to the effect that the former verdict found that certain remaining parts of lots 1 and 30 in block 27, and lots 1 and 16

in block 28, would be damaged by opening of said street, and the issue is not now whether or not said lots were benefited, as that has been settled. And further, that the appellant is the holder under grants from the owner of said lots at that time, and petitioners are estopped by said verdict and its confirmation from now asserting that said lots were benefited by the said street extension.

The plea is untenable. The former verdict not only shows that the parts of the lots mentioned were condemned, and part damaged, with the assessments therefor, but also that the remaining parts of the same were found to be benefited to a considerable extent. The former verdict, when confirmed, became conclusive as to the damages, and that question was not attempted to be reopened. The assessment for benefits having been vacated, the single purpose was to reassess the lots therefor. In general proceedings for condemnation, benefits to remaining land are to be set off against damages thereto. When separately stated in the verdicts in cases like this, one finding may be confirmed and the other vacated and opened for another assessment, as provided by the law.

The appellant, having acquired title pending the proceedings, takes subject thereto, and is bound thereby. Wilkinson v. D. C., 22 App. D. C., 289, 295: Buchanan v. MacFarland, present term. Moreover, it was substantially conceded on the argument that the appellant in this case is a corporation organized for the *the* purpose of taking over and holding the property of the former owner, John Sherman, for the benefit of his devisees.

7. The seventh assignment of error is: "The court erred in granting the first prayer on behalf of the appellees, whereby the court said, by extension of the street the jury was to understand its establishment, laying out and completion for all ordinary purposes of a public highway, and erred in refusing to grant appellant's five separate prayers for instructions; and further erred by said first instruction by saying to the jury that they might assess the benefits which had resulted to any and all other pieces of land from the extension."

(1) This first instruction copied in the preliminary statement, appears to have been a fair and just one. The purpose of the condemnation proceeding was the opening of Eleventh street for all the ordinary uses of a street. The grade was known and taken into consideration by the jury which awarded not only the value of the land actually taken, but also the damage done by the reduction of the grade which would compel the grading of the adjacent lots and portions of lots. The purpose being to open and grade the street and damages having been awarded as the result of said opening for use, it was proper to assess the benefits accruing therefrom also. Any danger, however, that the jury would consider the benefits arising from any other improvements in the street than those above mentioned was entirely removed by the second and fourth instructions. These excluded any future or speculative benefits arising from special improvements in or uses of the street subsequent to condemnation and opening as aforesaid. The benefits arising from the opening of the street, though not immediately realized in full, were so far present

as to be certain and ascertainable. All that was proper in the refused instructions is contained in those given.

(2) Assuming that the record shows that assessments for benefits extended beyond the area fixed by the former law, these were made under the act of June 6, 1900, which contains no such limitation, but permitted the assessment to be made against all lands benefited by the street extension. See sec. 6, 31 Stat., 637. Committed, as we have seen, to the procedure under said act, the appellant is bound thereby. Moreover it is not perceived that any injury accrued to the appellant by reason of the extension of the area of benefits. Congress, in the exercise of its taxing power for the establishment and widening of streets, had the power to require the expense of the same to be taxed against all property found to be benefited, generally or in a defined district. Bauman v. Ross, 167 U. S., 548, 549. In this instance it required one-half the cost to be assessed, first in a certain district, and later to an area within the limits of actual benefits received. The latter method is the most equitable. Now as the amount of one-half had to be assessed under any conditions, the result of the extension of the area was to relieve the lands within the former fixed area to the extent of benefits assessed against lots situated farther away. That Congress had the power to alleviate the burden imposed by the former law by extending the assessment to all property actually benefited, at the same time giving all owners an opportunity to be heard before the assessment tribunal, we think can not be successfully denied.

8. The eighth assignment relates to exceptions taken to the refusal of the court to permit the appellant to have the jurymen examined in order to show that they had not been properly selected and sworn. This question has been disposed of under the third and fourth assignments of error.

9. The ninth assignment of error is: "The court erred in not taking up and considering the evidence and the several objections and exceptions taken thereto before said jury, and the rulings of said jury and objections noted in the record."

It must be remembered that the jury are required to view the premises and then to hear evidence either in the presence of the court or not as the court may direct. 31 Stat., sec. 4, p. 666. Without objection, the court directed the hearing to be had out of its presence. Passing by the objection to this assignment of error that it does not specify the particular points of exceptions, but refers to the proceedings as a whole, we think that the bill of exceptions as taken does not authorize inquiry as to the competency of the evidence, or as to its sufficiency and weight as raised by the tenth assignment of error, which has been argued with this on the brief. It does not recite the evidence as taken before the jury, nor present an agreed statement of the same. As recited, it purports not to be a transcript of the evidence actually given, but merely an affidavit of the stenographer that it contained the substance of that evidence, which seems to have been preserved. And in conclusion it is recited that it contains, not this affidavit, but an abstract made by the appellant therefrom; and that the court declined to hear or consider the same.

Where the ground of objection is that the verdict is unsupported

by the evidence, the bill of exceptions must show upon its face that it contains the substance of all the evidence given in the case. We have said that it would seem that a full report of the evidence had been made and filed in the court below, because, in proper time, before the submission of the cause, the appellees made a suggestion of diminution of the record and applied for a certiorari to bring up a transcript of the entire report of the evidence, sworn to be on file in the court below, and make it a part of the record. The application was denied because it did not appear that the report had been used as evidence on the hearing of the exceptions to the verdict and preserved by bill of exceptions. Even if the entire evidence were before us, it would be necessary to point out some apparent misconduct or plain mistake on the part of the jury of assessment to authorize its consideration, as they were required to view the premises, and were, therefore, in a situation to know the actual conditions and to test the reasonableness and weight of the evidence. No such situation was occupied by the court passing on their verdict, as the witnesses were neither seen nor heard by him. Shoemaker v. U. S., 147 U. S., 282, 305.

Having found no reversible error in the proceedings in the case, we must affirm the judgment with costs. It is so ordered.

Affirmed.

TUESDAY, *March 31st*, A. D. 1908.

No. 1833. January Term, 1908.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD,
March 31, 1908.

TUESDAY, *April 7th*, A. D. 1908.

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

On motion of Mr. Leo Simmons, attorney for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Columbia Heights Realty Company, Appellant, and Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia, Appellees, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

____ ____

____ ____.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Columbia Heights Realty Company, as principal, and Hoyt Sherman, as surety, are held and firmly bound unto Henry B. F. McFarland, Henry L. West and J. J. Morrow, Commissioners of the District of Columbia in the full and just sum of Three hundred ($300) dollars to be paid to the said Henry B. F. McFarland, Henry L. West and J. J. Morrow, and their successors as Commissioners of the District of Columbia certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of April, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court between the said Columbia Heights Realty Company, a corporation and the said Commissioners of the District of Columbia and known as No. 1833, October Term, 1908,

of said Court a judgment was rendered against the said Columbia Heights Realty Company affirming certain assessments against its land and the said Columbia Heights Realty Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry B. F. McFarland, Henry L. West and J. J. Morrow, Commissioners aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Columbia Heights Realty Company shall prosecute said writ of error to effect, and answer all costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Columbia Heights Realty Company.]

COLUMBIA HEIGHTS REALTY COMPANY, [SEAL.]
By P. T. SHERMAN, *President.* [SEAL.]
HOYT SHERMAN. [SEAL.]

Attest:
A. W. HOYT, *Secretary.*

Sealed and delivered in the presence of—
B. L. SIMMONS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

O. K.
E. H. THOMAS.

[Endorsed:] No. 1833. Columbia Heights Realty Company, Appellant, vs. Henry B. F. Macfarland et al. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 28, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To Henry B. F. Macfarland, Henry L. West, and Chester Harding (Acting), Commissioners of the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Columbia Heights Realty Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of April, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 28, 1908.

EDWARD H. THOMAS,
Counsel for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 28, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 129 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Columbia Heights Realty Company, appellant, vs. Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia. No. 1833, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 28th day of April A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,163. District of Columbia, Court of Appeals. Term No. 157. Columbia Heights Realty Company, plaintiff in error, vs. Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia. Filed May 6th, 1908. File No. 21,163.

In the Supreme Court, United States.

OCTOBER TERM, 1908.

COLUMBIA HEIGHTS REALTY CO.,
Plaintiffs in Error,
vs.
HENRY B. F. MACFARLAND *et al.*,
Defendants in Error.
No. 388.

Motion to Advance.

The writ of error in the above case is from the judgment of the Court of Appeals of the District of Columbia affirming an order of the Supreme Court of the District of Columbia and levying certain assessments against the property of the plaintiffs in error under certain acts of Congress approved March 3, 1899, and June 6, 1900, for the extension of 11th Street in said District.

The case was in this Court on appeal of the defendants in error in the October term 1902, and was dismissed for want of jurisdiction. McFarland *vs.* Byrnes *et al.*, 187 U. S. 247.

The case originated in the Supreme Court of the District of Columbia, and was filed May 31, 1899. The object of the proceeding being for the extension of 11th street from Florida Ave. to Lydecker Street in the District of Columbia. After a jury of seven in said case had made certain awards for the land taken for the extension of said

street and levied certain assessments against the abutting land for benefits, pending confirmation of same by the Court, Congress passed an act, commonly known as the Act to Extend Columbia Road East of 13th Street, and the same was approved on June 6, 1900. The provisions of said Act directed the Commissioners of the District of Columbia in case they found the assessments levied in said 11th Street case under the Act of March 3, 1889, 30 Stats., 331, void to proceed to reassess the benefits in accordance with the provisions of said Act of June 6, 30 Stats., 665.

On the 3rd day of July, 1900, said Supreme Court of the District of Columbia sitting as a District Court, passed an order confirming the award for damages and condemning the land necessary for the extension of the street but vacated and set aside the assessments for benefits and held them void.

By the first Act of Congress, March 3, 1899, the area for assessment for benefits was limited to 200 feet on either side of the street to be extended and by the act of June 6th, the area was unlimited. From the decree of July 3, 1900, setting aside the assessments, the Commissioners of the District of Columbia, the defendants in error, appealed to the Court of Appeals and the lower Court was reversed, (McFarland *vs.* Byrnes *et al.*, 19th Appeals D. C., 538), it being held that while the error had been committed in vacating the assessments, yet the appellees or property owners under the provisions of Chapter 11, Revised Statutes of the District of Columbia, which was made the mode of procedure under the Act of March 3, 1899, were entitled to a new jury of twelve.

From the ruling of the Court of Appeals, the defendants in error, then the appellants, appealed to this Court and the case was here dismissed for want of jurisdiction as aforesaid. The case then returned to the lower Court on the

mandate of this Court, and the Court of Appeals, and notwithstanding the Court of Appeals had ruled that the land owners subject to assessments were entitled to a jury of twelve under said Act of March 3, 1899, and that the same was still in force, the defendants in error believing that they could not proceed otherwise in accordance with the Act of June 6th, on the 9th of Aug. 1904, began proceedings ~~on the 9th of August, 1904~~ by filing a supplemental petition under said Act of June 6th, for the reassessment of benefits which provided for a jury of seven as aforesaid, to which supplemental petition, the property owners including the plaintiffs in error in this cause, filed certain pleas of *res adjuticata,* statute of limitation and want of jurisdiction generally in the Court. The jury summoned under said supplemental petition returned its verdict on June 6, 1906, levying assessments against the abutting property to the extent of $96,000, of which amount $24,500 was levied against the property of the plaintiffs in error.

Thereafter the plaintiffs in error and other property owners filed further exceptions and objections to the confirmation of the verdict and took certain exceptions to the rulings of the Court on overruling its pleas and to certain rulings ~~of~~ the Court as the case proceeded.

And on the 6th of May, 1907, the Supreme Court of the District of Columbia sitting as a District Court, overruled all exceptions and objections to the verdict of the jury last named, and confirmed the assessments for benefits as returned, from which order an appeal was noted and prosecuted under a bill of exceptions signed and allowed by said Supreme Court of the District of Columbia.

On the 31st day of March, 1908, the Court of Appeals affirmed said judgment, in so far as it affected the plaintiffs in error, and on the 7th day of April, 1908, a writ of error was allowed and the record filed in this Court, on the 6th

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day of May, 1908, the case being now upon the calendar of this Court and is known as No. 388.

Many of the questions involved are new and intricate and as very nearly the whole amount of said assessments levied by said last named jury are unpaid and depend upon the ruling of this Court for collection, it will be seen that an early hearing of same is very necessary. Besides the property so assessed has been listed for taxes and should be sold in March next, and unless this Court can pass upon the questions involved before said date and in case the judgment of the Court of Appeals is reversed, great complications would likely occur involving the District of Columbia in serious litigation.

The case, now pending, is only one of a great many, the other cases having been postponed for action until after this case is disposed of.

There are other proceedings now pending in said Supreme Court of the District of Columbia for the levying of assessments under said Act of June 6, 1900, on certain land abutting on Sherman Ave. in said District, and many of the same questions are involved, so it will be seen that it is of the utmost importance to the public, that this case should be disposed of at as early a date as possible.

The premises considered, the defendants in error, and the plaintiffs in error, respectfully pray the Court that this case be advanced for hearing for some time during the month of February next.

Respectfully submitted,

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attys. for Defendants in Error.

LEO SIMMONS,
Atty. for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 157.

COLUMBIA HEIGHTS REALTY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND ET AL. COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

By Section 3 of an Act of Congress approved March 3, 1899, (*30 Stat. 1344*) the Commissioners of the District of Columbia were directed to institute within ninety days in the Supreme Court of the District of Columbia, a proceeding to condemn land for the extension of Eleventh Street from Florida Avenue to Lydecker Avenue. The statute also provided, that at least one-half of the damages awarded for and in respect of the land condemned should be assessed against abutting lands to a depth of 200 feet on each side of the street to be condemned; and further, that the proceedings should be under and according to the provisions of Chapter Eleven of the Revised Statutes, D. C. By Sec-

tion 257 of Ch. II., Rev. St., D. C., it is provided that damages shall be assessed by

> "A jury of seven judicious, disinterested men, not related to any party interested;"

and, by Sec. 263, it is provided that,

> "If the proper authorities, or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested"

who shall determine the damages, etc.

May 31, 1899, John B. Wight, John W. Ross and Lansing H. Beach, then Commissioners of the District of Columbia, filed their petition in the Supreme Court of the D. C., for the condemnation of the land necessary to the extension of Eleventh Street, a jury of seven was summoned, and on February 20, 1900, a verdict was returned, one-half of the total award of damages being assessed against the abutting property as benefits. (Rec. 4, 5.) To this verdict John Sherman and A. M. Hoyt, owners, under whom the plaintiff in error claims title, filed exceptions. While these exceptions were pending Congress passed an Act, approved June 6, 1900 (31 Stat., 665), for condemnation of lands for other streets, section 4 of which provided that the Court should

> "cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said Court shall administer an oath or affirmation *that they are not interested in any manner in the land to be condemned nor are in any way related to the*

> *parties interested therein, and that they will, without favor or partiality, to the best of their judgment, assess the damages each owner of land taken may sustain by reason of the extension of said street, and the condemnation of lands for the purposes of such extension, and assess the benefits resulting therefrom as hereinbefore provided.* The Court before accepting the jury shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections and to excuse any juror, or cause any vacancy in the jury when impaneled to be filled."

Section 17 referred to the proceedings for the extension of Eleventh Street under the Act of 1899, authorized the Commissioners of the District of Columbia to apply for the ratification of the awards of the jury in respect of that extension; and provided further that in the event that the assessments for benefits should be for any reason declared void, the Commissioners should make application

> "for a reassessment of such benefits under and in accordance with the provisions of this Act."

It will be noticed that this Act of 1900 differs from the Act of 1899 in several particulars, but especially as to the assessment area, which is confined by the Act of 1899 to 200 feet on either side of the street to be opened, while in the Act of 1900 the area is without limit.

July 3, 1900, on motion of the Commissioners to confirm the awards and assessments as made, the court *confirmed the awards for damages, and vacated the verdict as to benefits.* (Rec. pp. 6, 7.) The Commissioners appealed from so much of the judgment as vacated the assessments for benefits. The Court of Appeals, constrained by the decision of this Court in *Wight* v. *Davidson,* 181 *U. S.,* 371, reversed

the judgment and remanded the cause, holding, however, that since

> "by the discordant tenor of judicial decision" the appellees were induced to forego their right to a second jury of assessment, that right should be restored to them, should they desire to avail themselves of it."
>
> (McFarland v. Byrnes, 19 App. D. C., 531, 538.)

From the judgment of the Court of Appeals, the Commissioners appealed to this court. This appeal was dismissed for want of jurisdiction (Rec. p. 9), and the mandate of the Court of Appeals filed in the Supreme Court, D. C., July 22, 1903. Nothing further was done until March 4, 1904, when the Commissioners again moved the Court to confirm the assessments for benefits, and the Court, after a hearing, overruled the motion, and ordered

> "in case the petitioners desire to proceed further in the premises, that they shall within a reasonable time make application to this Court for directing the United States marshal to summon a jury of twelve as provided by law."

The Commissioners appealed in open Court (Rec. p. 10).

No further action having been taken by the Commissioners, the property owners gave notice of a motion to dismiss the proceedings (Rec. p. 10).

On June 17, the Court ordered the petitioners to proceed within sixty days

> "in accordance with the terms and provisions of the Act of Congress, approved June 6, 1900."

This order was made without previous discussion, and without consent of the property owners or their counsel. (Rec. pp. 35, 36.)

August 9, 1904, the then acting Commissioners filed a supplemental petition, entitled in the same cause, and prayed the summoning of a jury of seven, *under the Act of June 6, 1900,* to re-assess the benefits from the extension of Eleventh Street (Rec. p. 11). Notice by publication was ordered, directing appearances by November 28 (Rec. p. 14).

The cause stood in this wise for more than fifteen months, and until February 9, 1906 (nearly seven years from its institution), when a jury of seven was summoned to retry *the question of benefits.* (Rec. p. 50).

The Bill of Exceptions shows the entry of an order which recites that the Court

> "having accepted said jury as qualified, and having administered to them an oath in accordance with the provisions of an Act of Congress, approved June 6, 1900, entitled" * *

but the justice presiding also certifies that

> "without having first examined said men or any one or either of them as to the qualifications prescribed by the said Act of June 6, 1900, the Court administered the oath to said men, that they would assess the benefits accruing to the property abutting or adjacent to 11th Street extended according to the Statute." (Rec. pp. 51, 52).

At the passing of the order last referred to, counsel for the land owners was not present (Rec. p. 51), but after the jury was thus sworn, and before they were instructed in their duties

> "the court not having done so, counsel for the appellant undertook to examine said jury as to their qualifications, but the Court refused to permit counsel

to ask them any question at all, because no questions were suggested before they were sworn. (Rec. p. 52.)

Counsel for the property owners then moved the Court to strike out the amended and supplemental petition on the grounds that it was filed without authority of law, and not in compliance with the order of March 3, 1904; and further, that if any action was to be prosecuted under the Act of June 6, 1900, it must be a new or original proceeding. This was overruled March 9, 1906, and by said order the property owners were given the right to interpose any objection they might desire with the same effect as if the Commissioners had begun a new suit. (Rec. p. 49). From this order the Commissioners appealed. (Rec. p. 49).

The plaintiff in error then pleaded specially. First, that the proceeding was barred by limitation; second; that the previous jury had found that the remaining parts of lots 1 and 30 in block 27, and lots 1 and 16 in block 28, and the land adjoining said lots would be damaged by the opening of the said street, and the verdict had been confirmed by judgment, and that, therefore, the issue as to whether the said lots were benefitted by the extension of Eleventh Street had been adjudicated, and the said judgment was pleaded in bar. (Rec. p. 50).

Plaintiff in error then moved to discharge the jury as not having been selected and summoned as required by law, which motion was overruled, an exception being noted. (Rec. pp. 54, 55).

The plaintiffs in error excepted to the instruction given, and to the refusal of the Court to grant certain prayers for instruction presented on its behalf.

June 6, 1906, the jury returned a verdict which assessed benefits against the property of plaintiffs in error to the

amount of $24,500. (Rec. pp. 105, 106, 107). The parts of lots 1 and 30 in block 27, and lots 1 and 16 in block 28, not taken for the street, were assessed respectively, $1,500, $1,500, $4,000, and $5,000.

Plaintiff in error moved to set aside the verdict, but the motion was overruled, and the verdict confirmed. (Rec. p. 48).

A bill of exceptions was taken and the cause appealed to the Court of Appeals, which affirmed the judgment below. A writ of error was then taken to this Court. (Rec. p. 130).

ASSIGNMENT OF ERRORS.

I. The Court erred in refusing to strike out the amended and supplemental petition, and in permitting the petitioners to proceed under the Act of June 6, 1900, instead of under the Act of March 3, 1899, under which the proceeding was commenced, and as required by the opinion of the Court of Appeals.

II. If the amended and supplemental petition might lawfully be prosecuted under the Act of June 6, 1900, the Court erred in not inquiring of the jury of their qualifications, and in not administering to the jurors the oath required by said Act.

III. The Court erred in refusing to discharge such jury on motion of plaintiffs in error.

IV. The Court erred in overruling the plea of *res judicata*, as to lots 1 and 30 in block 27, and lots 1 and 16 in block 28, and in suffering the said second jury to consider if said lots were or were not benefitted.

V. The Court erred in not sustaining the plea of limitations interposed by plaintiffs in error.

VI. The Court erred in granting the first prayer given the jury on behalf of the Commissioners, and in instructing

the jury that "by extension of the street, the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare or highway."

VII. The Court erred in granting and giving to the jury the third instruction asked by the Commissioners.

VIII. The Court erred in rejecting the 1st, 2nd, and 3rd prayers for instructions submitted on behalf of the plaintiffs in error, and each of them. (Rec. pp. 53, 54.)

IX. The Court erred in overruling the motion of plaintiffs in error to vacate the verdict of the jury, and in confirming the said verdict over the appellants' objections.

X. The Court erred in refusing to review the evidence taken before the jury and to determine if the verdict was unjust and unreasonable.

ARGUMENT.

I.

The cause was instituted under a law which provided for a first jury of seven, to be followed, in case of dissatisfaction with their verdict, by a jury of twelve. The Court of Appeals distinctly held upon the Commissioners' first appeal, that the property owners were entitled to have the *jury of twelve,* and remanded the cause for further proceedings in conformity with their opinion and decree. (Rec. p. 9, and *McFarland et al. v. Byrnes, 19 App. D. C., 538*). This was long after the enactment of the Act of June 6, 1900. The Court below ignored the mandate and the opinion, and proceeded under an act which allowed only one jury of seven.

We submit that whether the Court of Appeals was or was not right, the Court below should have obeyed the mandate. Right or wrong, this was the law of the case. *U. S.*

v. N. Y. Indians, 173 U. S., 464; Chaffin v. Taylor, 116 U. S., 567. And we submit that the Court of Appeals was right in its decision that the Act of 1900 did not repeal the Act of 1899, and that the further proceedings should have been under the first Act. The Court said:

> "The holding of this Court that the Act of March 3, 1899, was unconstitutional, did not, therefore, avail to set in motion the instrumentalities of the Act of June 6, for reassessment. And when the Supreme Court of the United States held the Act of 1899 to be a constitutional and valid exercise of legislative authority, *the reasons for reassessments under the Act of June 6, vanished.* Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury under Chapter II."

Upon the appeal from the judgment upon the second verdict the Court of Appeals held plaintiffs in error estopped to make this objection, because, by a motion filed June 17, 1904, it asked the dismissal of the proceedings

> "because the law under which such proceeding must be had has been repealed"

and because the petitioners had failed to proceed. (Rec. p. 10).

We submit that this motion, which was substantially overruled by the refusal to dismiss, cannot be held to operate as an estoppel by election, and that the decisions cited by the Court of Appeals to sustain its opinion, and which show only that an election by a plaintiff *between forms of remedies,* will bar, are wholly inapplicable.

The cause having been instituted under Chapter II, and that statute not having been repealed, the Court should have proceeded under that Act.

II.

The failure of the Court to interrogate the jurors as to their qualifications and to administer to them the oath required by law, vitiates the verdict.

In empanelling the second jury in March, 1906, the Court was proceeding under the Act of June 6, 1900. That statute provides for the selection of jurors having certain special qualifications, and in terms requires that the Court *shall* administer to them an oath or affirmation in terms which are carefully set out. (31 Stat., p. 665). Without examining the persons summoned as to their qualifications under the statute, the Court disregarded the statutory oath, and swore the jury only to

> "assess the benefits accruing to the property abutting or adjacent to Eleventh Street extended, according to the statute." (Bill of exceptions: Rec. p. 52).

A little later the Court refused to permit counsel for plaintiffs in error to inquire of the jurors of their qualifications. It was, therefore, not ascertained if the jurors were "interested in the land to be condemned, or related to the parties interested therein," nor did they obligate themselves to make the assessments, *"without favor or impartiality to the best of their judgment,"* as this mandatory statute requires.

It is true that in the order signed by the judge (Rec. p. 50), it is recited, that the Court "accepted the jury as qualified," and "administered to them an oath in accordance with the provisions of an Act of Congress, approved June 6, 1900, entitled" * * * , but these general terms are explained by the same judge in the bill of exceptions signed by him, in which he certifies that he took no steps to learn

if the jurors were qualified, and adopted a form of oath which omitted all the requirements of the statute. His conclusion, that the oath administered was in accordance with the statute, must give way to his certificate showing the terms of that oath thus administered. *Wertz on Courts and their jurisdiction, p. 128; Thompson v. Whitman, 18 Wall., 458; Knowles v. Gas Light Co., 19 Wall., 58; Cooper v. Newell, 173 U. S., 566; Forsyth v. Hammond, 142 Ind., 519.*

This was a special proceeding, not according to the course of common law, in which the Court acquired all its jurisdiction from the statute. It is true that the Court is one of general jurisdiction, but this will not affect the question. The rule in such cases is stated by *Wertz* as follows:

> "When the statute provides for the manner of acquiring jurisdiction, and the mode of proceeding thereafter, in this class of courts and cases, the provisions of the statute must be followed or the Court will be without power to act. And the proceedings must show upon their face that jurisdiction has been obtained and the power delegated by the statute has been exercised in the appointed mode."
>
> *Wertz on Courts and their Jurisdiction, p. 88.*

And the rule was laid down in this Court in an early case, as follows:

> "In summary proceedings, where a Court exercises an extraordinary power, under a special statute, prescribing its course, we think that course ought to be exactly observed, and those facts which especially give jurisdiction ought to appear, in order to show its proceedings are *coram judice*. Without this act of assembly the order for sale would have been totally void. This Act gives power only on a report to be made by the sheriff. This report gives the Court jurisdiction,

add without it the Court is as powerless as if the Act had never been passed."

Thatcher v. Powell, 6 Wheat., 119:

"When superior courts exercise special statutory powers, in accordance with the usual form of common law or chancery proceedings, the usual presumptions of jurisdiction are entertained; but when those powers are entertained in the special or summary manner, the record must show that the court had jurisdiction and *proceeded in the way provided by the statute.*" 12th Am. Eng. Enc. of Law, 276, 277 and 278. Windsor v. McVeigh, 93 U. S., 274.

"Assessments upon land can lawfully be made *only* when the statute which authorizes them has been substantially complied with." Grace v. Board of Health, 135 Mass., 490-497.

We cite some decisions in point on the facts:

A statute of Wisconsin provided for proceedings for the condemnation of lands for highways and that the commissioners to be appointed by the county judge before acting should be sworn *"justly and impartially to discharge their duties."* Certain commissioners were sworn to "fairly and impartially hear the evidence given and review the premises mentioned in the matter of the appeal in the above entitled matter, and fairly and impartially decide the same."

Held: That the oath administered was not in terms or in substance that required by the statute, and conferred no jurisdiction upon the Commissioners. *State ex rel Vos v. Hoelz, 69 Wis., 84.*

A Minnesota statute provided that commissioners to lay out roads should take an oath "that they will faithfully and impartially discharge their duties as provided by this act, and fairly and impartially assess the damages, if any, they

find to be sustained by owners of land through which said road may run, and then proceed to discharge their duties."

Certain commissioners to lay out a road took an oath that "we will faithfully proceed to locate and establish said State road according to the provisions of said act, and according to the best of our abilities."

Held: That the oath taken was such as the act required and the subsequent proceedings were void.

State ex rel. Berfield v. Board of County Com's. 27 Minn., 90.

A New Jersey statute enacted that when an application should be made for the opening of a street the Common Council should appoint a time for hearing objections, etc. The record showed that the Common Council simply directed the clerk "to give the required notice for objections."

Held: That the power delegated was not strictly pursued, and the jurisdiction failed.

State v. Mayor of Jersey City, 1 Dutch, 309; see also, State v. City of Passaic, 38 N. J. L., 172.

A California statute providing for the taking of land for public uses, required a petition to the city council to contain: "A statement that in the opinion of the petitioners *the public interests* require that the improvement asked for" be made. A petition contained a statement "that in the opinion of the petitioners the improvement asked for should be made."

Held: That the record affirmatively showed want of jurisdiction, and that the subsequent proceedings for condemnation in the County Court, based on that record, were invalid. *In re Grove Street, 61 Cal., 438; Dayton v. Western R. R. Co. v. Marshall, 11 Oh. St., 497; Crawford v. People, 82 Ill., 557; In re. Cambro Street, 57 Pa. St., 357.*

It is to be noted that counsel for plaintiffs in error in the

cause at bar promptly moved the discharge of the jury. (Rec. p. 55).

III.

The judgment upon the first verdict that the parts of lots 1 and 30 in block 27, and of lots 1 and 16 in block 28, not taken for the street, were in fact, damaged, was a bar to further inquiry on that point, and the plea of res judicata (Rec. p. 49) should have been sustained.

Parts of these lots, as platted, lay beyond the extended street lines. (Map, Rec. p. 2.) The grade of the new street required a deep cut, which would necessarily damage these untaken parcels. (Photographs, Rec. p. 99, 100.) The Court recognized this, and charged the (first) jury that "in estimating the damages to be awarded they should take into consideration the condition in which the remaining part of the land is left, by reason of the extension and opening of said street, and also the cost of protecting such part of the land adjoining such cut, and the buildings, if any, and make allowance accordingly."

Accordingly, the jury allowed "grade damages" of $2,500, $1,469, $6,300, and $6,300, respectively, in favor of the lots mentioned. (Rec. p. 4).

On the other side, under the head of "Assessment of Benefits," etc., they charged these remaining parcels with $1,517, $1,517, $4,687, and $4,591, respectively (Rec. p. 5), thus at once alleging that these parcels were both damaged and benefitted.

This assessment for benefits was vacated and the awards of damages confirmed, and payment thereof adjudged to be made. (Rec. pp. 6, 7).

This was a judgment, then, that these particular parcels were damaged by the extension of Eleventh Street.

When the second jury was sworn, in 1906, the plaintiffs in error pleaded *res judicata* as to those four parcels in bar of any investigation of benefits (Rec. p. 50), but the Court overruled the plea, and by the third instruction told the jury to find the damages done these parcels (and others similarly situated) by the change of grade, and in doing so *to review the finding of the first jury as to damages.* (Rec. p. 53). This jury then found these parcels benefitted, respectively, $1,500, $1,500, $4,000, and $5,000, or $12,000 in all. (Rec. pp. 16, 17).

The owner of these lots was a second time required to prove the damages sustained by the change of grade, although an unreversed judgment had established those damages six years before, and this although this second jury was powerless to increase the damages and award any further sum to the property owner. The importance of this is shown by the fact that the award for "grade damages" (by the first jury) in respect of the lots in these two squares was $16,569, while the actual cost of the grading, as subsequently determined, was $54,764.80. (Howell's test., Rec. p. 85).

If the Court had been asked to instruct the second jury that if they should find the amount awarded for "grade damages" by the first jury was inadequate to compensate the property owners for the necessary grading, they should award them such further amounts as would make them whole, would not the petitioners have objected, and the Court have held itself bound to refuse such charge?

That a judgment in condemnation proceedings is no more subject to impeachment than other judgments, and stands until reversed, is settled.

Seconbe v. Milwaukee & St. Paul R. R. Co., 90 U. S., 108; Am. & Eng. Ency. of Law, Vol. 6, p. 6.

The very point was passed upon in the Supreme Court

of New Jersey. An award of damages was made for the grading of a street. Fifteen years later an assessment for benefits accruing from that grading, was levied on the properties previously adjudged to be damaged. The court held that the first award when ratified was

> "equivalent to a judicial determination that the premises for which the compensation is awarded, are damaged, on a comparison of benefits and injuries, to the extent of the award, and so long as it stands neither the owner nor the city can gainsay it. *Aldridge v. Essex Public Road Board 22 Vroom, 166.* It is, therefore, not permissible for the city now to contend that the change of grade, thus adjudged to be on the whole detrimental to certain lots on which buildings stood. was, in fact, on the whole beneficial to the same property. So far as the assessments against such houses and lots have been levied for the grading of the street, they should be set aside," etc.
>
> *Davis v. Newark, 54 N. J. L., 596; Butman v. Vermont Cent. R. R. Co., 27 Vt., 500.*

It is further submitted that our contention is not in the least opposed to the doctrines of *Wight* v. *Davidson,* 181 *U. S., 371,* but gains support from it.

IV.

The proceeding under the "Amended and Supplemental Petition," filed August 9, 1904, was barred by limitation of time.

The petition was filed *more than four years* after the order of July 3, 1900, vacating the first assessment, and an even longer time after the approval of the Act of June 6, 1900. During all that time the property might have been proceeded against under the last cited statute, if it could be invoked at all, yet nothing was done under it.

The Statute of Limitations (Code, Ch. 41, Sec. 1265) provides:

> "And no action, the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued."

That a proceeding *in rem* for the recovery of taxes against real estate is an action there can be little doubt. In *Bristol v. Washington County, 177 U. S., 133-146,* this Court approved a decision of the Supreme Court of Minnesota, that the filing of a delinquent list for personal taxes was the institution of an action, which would be barred after six years under a statute which provided that actions "upon a liability created by statute," should be barred by the lapse of six years.

So under the same statute, proceedings to enforce the collection of taxes against real estate were held barred after six years.

County of Redwood v. Winona, etc., 40 Minn., 512.

To the same effect is the decision of this Court in *Meats v. County of Phillips, 108 U. S., 553;* where a proceeding in equity to have a County Court levy and impose taxes on a levee district was held barred by limitations.

It is apparent that this action accrued, if at all, under this statute, on July 3, 1900, when the Court declared the assessments for benefits illegal. The petitioners might *then* have filed an original proceeding under the Act of June 6, 1900, or their "supplemental petition," if that was ever the proper course to be taken. Their right to proceed *was complete as it ever became.* After three years passed that right was gone. If they had then filed an *original* petition, the plea of limitations surely would have been good. They are not helped by the filing of their petition by way of

amendment or supplement; it introduced into the case a feature quite new, and constituted a departure in law from the original petition.

In Union Pacific Railway v. Wyler, 158 U. S., 285, this Court reviewed the authorities upon this subject, and approved a statement of the general rule as follows:

> "While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces new matter, or a different cause of action not within the *lis pendens,* as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit."

That the plea of limitations is available against the District of Columbia, and the Commissioners thereof, is settled. (*Met. Ry. Co. v. District of Columbia, 132 U. S., 1, 11*).

The injustice of permitting an assessment for benefits, after six years, upon lands on the border of a rapidly growing city, such as Washington, must be manifest. In this case the appearance of the entire neighborhood changed between 1900 and 1906; streets were graded, sewers and water mains laid; houses built and a street railway put in operation on Eleventh street, which was also macadamized. (Rec. p. 60).

Witnesses simply could not exclude these facts from their consideration when testifying to the effect upon values of the condemnation of Eleventh Street. For example, the witness, Hopkins, called to testify for the petitioners, on being asked if he could give the market value of the ground without the car line and the improvements answered: "I don't think a living man could." (Rec. p. 59).

And see the affidavits of Robert E. Bradley et al. (Rec. p. 109).

V.

The Court erred in its instruction to the jury that they should assess benefits as for a street completed for all the ordinary uses of a public thoroughfare or highway.

The Act of March 3, 1899, authorized only "a proceeding *to condemn the land* necessary for the extension of Eleventh Street" on straight lines. It did not provide for the grading, guttering, sewering or macadamizing necessary to its "completion for all the ordinary uses of a public thoroughfare."

That the instruction was accepted by the jury as meaning what it says, is shown by the colloquy between counsel for the Commissioners and the chairman of the jury. (Rec. p. 64).

> "Mr. Sinclair: The Court said a completed street. The Chairman: I think the Court meant there, and what I will continue to consider, the condition of that street *as it is today*, leaving out the railroad. That is what the Court meant there."

And the expert witnesses were interrogated in the light of this understanding. Of the witness, Conrad Dodge, testifying to land values, a juror asked, "What is it worth *now?* (Rec. p. 57.) And of the witness, Hopkins, the attorney for the petitioners asked, "What is the value of the land now?" (Rec. p. 58).

And the Court emphasized its meaning by refusing the first, second and third prayers submitted by the plaintiffs in error (Rec. pp. 53, 54), which asked that the benefits to be assessed must be "the direct result of laying out and

establishing the street, and not the result of improvements since made, either in or upon the street itself, or abutting near-by lands."

The jurors then assessed benefits from a street completed "for all the ordinary uses of a public thoroughfare," although after the condemnation the Commissioners of the District of Columbia were, until further action by Congress, without authority to expend a dollar for making the extension practicable. As testified by the Surveyor, Eleventh Street extended was graded and cut under the appropriation act of 1901, and macadamized under the like act of 1902. (Rec. p. 60.) For the sewers, water mains and sidewalks the law provided special assessments on the abutting properties.

There was then no provision of the law for the completion of the street for all ordinary uses, and we submit the Court erred in giving this meaning to the words "extension of the street."

The statute contains no other words which can enlarge the meaning of the word "extension." This Court has determined the meaning to be given the term. In dealing with the Highway Extension Act of the District of Columbia, approved March 2, 1893, this Court held that the authority of the Court as found in Sections 6 and 7 of the Act, "to condemn a permanent right of way for the public" over the lands in question, did not include the actual laying out and construction of the new highways. And further, that the terms of Section 15, "highway condemned and established under this act," "laying out and opening of such highway," or simply "opening of any highway" evidently treat condemnation, establishment, laying out and opening of a highway as denoting one and the same thing, the appropriation or setting apart of land for a highway and throwing it open to public travel and *have no regard to the actual grad-*

ing or construction of the highway. Bauman v. Ross, 167 U. S., 548-586.

The term "opening of a street" was, in Ohio, held not to include "the improvement of a street or highway by grading, culverting, etc.", the Court saying:

> "The term opening refers to the throwing open to the public what was before appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface."
>
> *Reed City v. Toledo, 18 Ohio, 161-165.*

So the California Supreme Court said:

> "The *widening* of a street which is authorized by this act does not include the additional work of making the street suitable for travel and general use. The expense of such work is to be undertaken after the street has been widened. To widen a street is merely to enlarge its width, and the term widen cannot, under any construction of language, be extended to include grading and graveling."
>
> *Wilcox v. City of St. Louis, 101 Cal., 508.*

To the same effect are:

Gains v. Hudson County, 27 N. J. L., 12.
Baker v. Runnels, 12 Me., 237.

Counsel for defendants in error will doubtless urge that instructions 2 and 4 (Rec. p. 53) relieved from the error complained of. They are inconsistent with No. 1, but this does not better the situation, for, being inconsistent, they served only to confuse. An erroneous instruction is not cured by another inconsistent instruction.

11 Ency. Pl. & Pract., p. 146; Pitts. R. R. Co., v. Krouse, 30 Oh. St., 222.

"The diffiiculty created by inconsistent or contradictory instructions on a material point, is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed."

Standard Life, etc. Co. v. Sale, 121 Fed., 664, 669.

VI.

The first three instructions prayed by plaintiffs in error should have been given.

In substance these prayers asked only that the lands be assessed for such benefits, if any, as had accrued to the land from the *extension of the street only*. Since this was the only improvement authorized, these prayers correctly presented the rule. As we construe the first prayer granted the petitioners, these three prayers are in direct opposition to its theory. If that was wrong, these were right. If they were refused because supposed to be already substantially allowed in instructions 2 and 4, we submit that yet they should have been given, as setting out with much more clearness the true rule to govern the jury.

The refusal of the Court to consider the evidence taken before the jury.

The statute (31 Stat., 665,) provided that the jury might hear the evidence out of the presence of the Court; and the Court's order so directed (Rec. p. 51), and the testimony was so taken. Upon the coming in of the verdict, counsel objected to its confirmation because it was in disregard of the evidence, contrary to the evidence, and unreasonable (Rec. p. 108, par. 8). Counsel for plaintiff in error presented to the court the testimony reduced to writing, but "the court declined to hear the same or consider

it at the time in full," and afterward "without reading the evidence or having it fully read," the exceptions were overruled, and the verdict confirmed (Rec. p. 112). The statute provides that the court may set aside a verdict in such a case "when satisfied it is unjust or unreasonable." This necessarily requires that the court shall review the facts as exhibited in the testimony; and this duty may not be avoided by a refusal to sit with the jury. In such case he must consider the testimony as reported to him, whether by a stenographer or by undisputed affidavits. In this case the court received what he certifies to be "the substance of the evidence taken before the said jury" and then refused to consider it (Rec. p. 112).

See *Met. R. R. Co.* v. *District of Columbia, 105 U. S., 322.* And this court has the same right of examination. *Beyer v. La Fevre, 186 U. S., 114.*

The verdict was unreasonable and unjust. The abutting land of the plaintiff is what was not taken of lots 1 and 16 in block 28 and of lots 1 and 30 in block 27.

This property had a greater market value before the extension of the street and the grading (when it was left from 28 to 38 feet above the new grade, Rec. p. 86), than it had afterward, and the witnesses on both sides so testified.

> Doyle's test (Rec p. 55).
> Dodge's test p. 55; Walsh p. 63.
> Gordon p. 64; Mallery, pp. 64, 65.
> McLaughlin p. 67; Ballinger pp. 70, 71.
> Howenstein p. 74; Hawn p. 76; Meyers, p. 79.
> Shoemaker p. 81; Hill p. 82; Beal p. 85.
> Saunders p. 88; Earr p. 90; Ellerson p. 94.
> Minnix p. 95.

All of these witnesses, some of them being called by the District of Columbia, testified in substance or directly, that the lots in question were injured by the extension and grad-

ing; most of them thought the lots, when brought to grade, would not sell for as much as their market value before the extension of the street, and gave their reasons; one or two of them thought prices had appreciated, but attributed the supposed increase in value *to the building of the car line.* (Shoemaker, p. 81.)

None of the witnesses testified to a benefit to the property in question except upon the assumption that sufficient damages had been previously awarded the owners of blocks 27 and 28 to reduce them to grade. This was constantly assumed by counsel for the District (Rec. pp. 58, 74, 77, 78, 81). For example, the witness Terrell was asked (Rec. p. 78):

> "2. Assuming the owners of the property (referring to blocks 27 and 28) were awarded $16,000.00 as grade damages to enable them to restore the property to the new grade, to what extent would you say the property had been benefitted by the extension of 11th Street?"

And he answered:

> "A. If the amount is sufficient to grade the property it has been benefitted very much."

But this assumption was wholly mistaken, as proved by Mr. Howell, the engineer who actually did the grading of these squares. From the lots in blocks 27 and 28 there were to be removed to bring them to grade, 116,866 cubic yards of earth, at an average cost of 48 cents per yard or $56,095, while the whole amount of "grade damages" awarded by the first jury was $16,569 (Rec. p. 4). The amount thus awarded was even less than the amount ($16,807) necessary to reduce the *four abutting parcels only* to the grade.

Viewed from another standpoint:

According to the undisputed evidence lot 1 in block 28 and the other lots in said square, cost to grade at the rate of 65 cents per cubic yard (Howell's evidence, Rec. p. 86), the sum of $8,102.25; the assessment levied against this lot is $4,000.00, making a charge against it of $12,102.25. At the highest rate fixed by the evidence this lot, when graded, would be worth only $11,717.00.

Lot 2 in block 28 cost to grade $7,878.00; the assessment against it is $1,000.00, making a total of $8,878.00. Its value, at 30 cents per square foot, would be $8,416.40, and as will be seen, this lot is given no new street, no new outlet, and no new advantage whatever.

Lot 14 in block 28 cost $11,886.55 to grade, and is assessed for $1,000.00, making a total of $12,886.55. This lot, at 40 cents per square foot, is worth $10,727.20. Thus the cost of same, if this assessment is to stand, would be $12,886.55, $2,159.35 more than its value.

Lot 15 in block 28 cost to grade $15,609.75, and is assessed for $2,000.00, making a total charge of $17,609.75. This lot, at 40 cents per square foot, would amount to $10,727.20, leaving the lot, having cost the parties, including the tax, $6,882.75 more than it is worth.

Lot 16 in block 28 cost to grade $12,645.10, the assessment is $5,000.00, making a total of $17,645.10. The lot, at 50 cents per square foot, would be worth $11,478.00, $6,167.10 more than it is worth.

Now combine these lots and see the situation:

Lot 1, block 28, cost of grade and assessment	$12,102.25
Lot 2, block 28, grade and assessment	8,878.00
Lot 14, block 28, grade and assessment	12,886.55
Lot 15, block 28, grade and assessment	17,609.75
Lot 16, block 28, grade and assessment	17,645.10
Total	$69,121.65

While the proof shows these lots are worth only $53,-055.80. Now suppose we add to this the amount allowed for grade damages in this block, to wit: $12,600.00, we have a total asset of $65,655.80 or $3,465.85 less than what has been expended on the land or what it cost the owners if this assessment stands, and this does not take into consideration the grading of other lots west of those in question, which was made necessary by the cutting down of the street, and neither does it take into consideration the absolute depreciation in value of at least one-half, by the lowering of the whole tract.

Suppose we base our calculation on the basis of 48 cents per cubic yard for grading, which is the price fixed for the average of the whole work in both squares, not counting the other expenses:

Lot 1, block 28, grade and assessment.....	$9,981.20
Lot 2, block 28, grade and assessment.....	6,870.60
Lot 14, block 28, grade and assessment....	7,281.76
Lot 15, block 28, grade and assessment....	13,537.20
Lot 16, block 28, grade and assessment....	14,339.52
Total.....	$52,010.28

While the proof shows that the land, as said before, at its highest estimate, is worth only $53,055.80, or within $1,045.52 of the actual cost of grading and assessment. Add to this the $12,600.00 allowed as grade damages to two of the lots in this square and it will thus be seen, if this assessment is to stand, that the owners of same will have received for 128,081 square feet of land the sum of $13,-655.52, a little over 10 cents per square foot, when it must be conceded that this land, before the street was condemned

and opened, taking the price fixed by the verdict and award of the former jury (and that less than the value placed upon it by the District's own witnesses), would have been worth more than $77,000.00; but if we take the unreasonable and unwarranted estimate placed upon this land by the witnesses for the appellees, that of 25 cents per square foot before the street was opened (see Doyle's Ev., Rec. p. 55), the value of same would be over $32,000.00, an actual loss of $20,000.00.

Mr. Sims, another of appellees' experts, graciously places the value of this land at 35 cents to 45 cents per square foot before the street was opened. But we submit that there is no ground for placing the value of this land at less than the price fixed by the former jury; that, as it is shown, is much less than the price the witnesses for the appellees' predecessor placed upon it at a time when it was possible to know, or would be if the street had not been cut down. Dodge's Ev., p. 57.

Other witnesses say the land was worth $1.00, etc.

But the estimate given of 65 cents per cubic yard is nearer the cost of grading than 48 cents. See Howell's Ev., Record page 86, where he says the steam shovel work in block 28 would cost about 65 cents per cubic yard, and it will be seen that this calculation did not include the grading of land east of the building line, a strip about twenty feet wide of this enormous embankment that had to be graded by the property owners. Richard's Ev., Record page 60.

And did not include the grading of lot 3 and other land west of the land mentioned. Howell's Ev., page 86.

So the confiscatory conditions fully appear in any light the proposition is figured.

The court should have examined the proofs and not have taken it for granted that the jury had done no injustice.

Upon all these grounds we submit that the judgment confirming the jury's award should be reversed.

LEO SIMMONS,
ARTHUR A. BIRNEY,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 157.

COLUMBIA HEIGHTS REALTY COMPANY,
PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANTS IN ERROR.

Many of the questions which arise on this record are identical with those in No. 148, the appeal in both cases being from the same original judgment. For a discussion of the questions common to both records, the court is referred to the brief filed by the defendants in error in No. 148.

The questions peculiar to this case relate—

First. To the matter of interrogating and swearing the jury.

Second. To the plea of *res judicata.*

Third. To the reasonableness and justice of the assessments and the refusal of the court to hear all the evidence which had been offered before the jury.

I.

The record shows compliance with the provisions of the statute with respect to the summoning, accepting, and swearing of the jury. Also that no objection was made as to these matters until after the jury returned their verdict.

The second assignment of error relates to the alleged failure of the court to interrogate the jurors as to their qualifications and to administer to them the oath required by law. The act under which the proceedings were had provided that the court, after the return of the marshal and the filing of proof of publication of the notice, should—

> "cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings and not in the service or employment of the District of Columbia, or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned, nor are they in any way related to the parties interested therein, and that they will without favor or partiality to the best of their judgment assess the damages each owner of land taken may sustain by reason of the extension of said street, and the condemnation of lands for the purpose of such extension and assess the benefits resulting therefrom as hereinbefore provided."

The return of the marshal (R., 50) recites that—

> "Pursuant to an order of the Supreme Court of the District of Columbia made today in the above-entitled

cause, you are hereby summoned as one of a jury of seven disinterested men, not related to any person interested in these proceedings and not in the service or employ of the District of Columbia or of the United States, to be empanelled and sworn on the 16th day of February, 1906, at 10 o'clock a. m., to reassess the benefits of an act of Congress approved June 6, A. D. 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes.'

"(Signed) AULICK PALMER,
"United States Marshal."
R.

The record further shows (R., 51) the order of the court accepting the jurors summoned by the marshal as indicated, as follows:

> "The marshal having summoned John E. Harrell, William A. H. Church, William B. Cox, James F. Oyster, Edwin Fraser, Edward Graves, and John H. Nolan, as a jury herein, as directed by an order heretofore passed herein, and the court having accepted said jury as qualified and having administered to them an oath in accordance with the provisions of an act of Congress approved June 6, 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes,' it is by the court ordered," etc.

The point is made that the court, being one of limited jurisdiction, every jurisdictional fact should appear on the face of the record. It is submitted that the recitals of the record satisfy all the requirements of the law, according to the great preponderance of authorities.

Lewis on Eminent Domain says on this subject, section 413:

> "*What the record should show as to the oath taken.*
>
> "The record should show that the commissioners have been sworn as required by law. Thus far there is no difference in the authorities. But as to how this should be made to appear in the record the decisions are at variance; some cases hold that the mere recital that the commissioners were sworn according to law is sufficient. (This proposition appears to be supported by the great weight of authority.)
>
> "Other cases hold that the facts should be stated which show a compliance with the law. The correct doctrine would seem to be that where the proceedings are under the supervision of a court of record and the tribunal is sworn at the bar of the court and the record of the fact is made a part of the proceedings in the case a simple recital that the oath was taken as required by law would be sufficient."

The record satisfies these requirements.

The plaintiffs in error rely in support of their contention upon the following statement in the bill of exceptions (R., 52):

> "On the 16th day of March, 1906, John E. Herrell, William A. H. Church, William B. Cox, James F. Oyster, Edwin Fraser, Edward Graves, and John H. Nolan, purporting to have been summoned, as aforesaid, appeared in said court and without having first examined said men or any one of them or either of them as to their qualifications prescribed by the said act of June 6, 1900, the court administered the oath to the said men that they should 'assess the benefits accruing to the property abutting or adjacent to Eleventh street extended, according to the statute.'"

There is nothing in this recital that contravenes the force or effect of the order of the court previously set forth accepting the jury.

The requirements of the act (see 4, *supra*,) respecting interest, etc., do not apply to this case, for the reason that this proceeding was not instituted for the purpose of condemning land. The recital in the bill of exceptions that the court administered an oath to the jurors that they should assess the benefits, etc., "according to the provisions of the statute" states practically a *pro tanto* compliance with the provisions of the law respecting the oath, which required that the jury should be sworn to "assess the benefits resulting therefrom (the extension of the street) as hereinbefore provided." It nowhere appears in the bill of exceptions or elsewhere in the record that the jury were not sworn to "faithfully and impartially assess," etc., and therefore the argument that the import of the order of March 16th, accepting the jury, is negatived by the statement in the bill of exceptions referred to, fails.

Again, if it appeared explicitly that the court had failed to administer the oath in strict conformity with the provisions of the law, no objection having been taken at the time by the plaintiffs in error, they having proceeded with the hearing before the jury, must be held to have waived that point. No objection or exception appears from the record to have been taken in the matter of administering the oath until after the jury had returned its verdict, and the objection came too late.

> "The first error assigned is that the jury who heard the case in the circuit court were not sworn in the manner directed by the statute.
>
> "The objection cannot avail the appellants anything in this court. It was the duty of counsel when he saw that the jury were about to be sworn

in the manner which he says is contrary to law, to have suggested same to the court; and, having failed to do so, the appellants cannot be permitted to urge the objection after verdict, either on the motion for a new trial or for the first time, in this court. Not having made the objection at the proper time he will be deemed to have waived whatever irregularity there may have been in the manner in which the jury was sworn." Rockford etc., R. R. Co. *vs.* McKinley, 64 Ill., 339.

"It is first urged that the return fails to show that the board was sworn to act as a judicial body, and that therefore it had no jurisdiction; and that, as the duties and powers under this act were not those prescribed by the consolidation act of 1882, their general oath of office was not sufficient to comply with the law. But no such objection was taken to the proceedings before the board of assessors; and the relator after having submitted himself to the jurisdiction of the board, cannot now be heard to raise the objection that they were not sufficiently sworn." People *vs.* Gillon, 76 Hon., 348.

"The objection that the committee was not sworn before giving notice of the time and place of hearing comes too late. * * * The reason given in all the cases is substantially the same, namely, that the party shall not take the chance of obtaining a decision in his favor without being bound by the result if the decision is against him.

"And in cases of this kind the court will presume knowledge on the part of the party objecting, unless the contrary is shown." Raymond *vs.* County Commissioners, 63 Maine, 110.

Therefore we contend: first, that all jurisdictional facts appear on the face of the record; second, that any objection as to the irrugularity in the form of the oath of the jurors was waived by the appellants by appearing and submitting their evidence to the jury.

The point that there was error in refusing to permit counsel to interrogate the jurors after they were sworn is equally without merit. No objection was made to any of the jurors, nor any motion made to discharge them on that ground, and to permit interrogation by counsel after the swearing of the jury in the absence of any allegation as to want of qualification, would, it is submitted, have been improper.

In the brief of counsel for the plaintiffs in error that they "promptly moved the discharge of the jury" (R., 55). The motion to discharge the jury referred to had no relation whatever to the oath administered to the jury. That motion was based on the allegation of counsel that the jury were summoned and empaneled by the deputy marshal instead of the marshal, as required by law, the basis for the motion being that the letter "R," supposed to indicate Robison, appeared underneath the signature "Aulick Palmer, U. S. Marshal" (R., 50). The motion was renewed after the return of the verdict, and the affidavit of Wm. B. Robison (R., 111) is directed to this contention. On this and the preceding propositions we quote from the opinion of Judge Barnard (R., 40, 41, 42).

> "Counsel for respondents contend that the jury was illegally constituted, because the members of it had been selected and summoned by the deputy marshal instead of by the marshal in person.
>
> "I am not able to see that the act of June 6, 1900, authorizing the marshal of the District of Columbia to summon jurors, requires that he should do this

personally. The law authorizes him to have deputies (sec. 186, Code, and secs. 780, 782, R. S. U. S.), thus seeming to recognize the fact that his duties are so numerous and so variant that it would be impossible for him to perform them all personally.

"Section 4 of the said act says that the jurors are to be summoned by the marshal of the District of Columbia, and does not say, 'or by his deputies,' although those words are used in the preceding section. That fact is not conclusive in my mind that the lawmakers intended the jurors should be summoned by the marshal personally.

"The language used for the summoning of grand and petit jurors in this District is similar to that used in said section 4, as will be seen by sections 210 and 211 of the Code, and by section 209, under certain contingencies, the court is authorized to direct the marshal to summon talesmen. In neither of these sections is any reference made to the deputy marshal, and yet it will hardly be contended that the marshal may not properly discharge the duties required of him by these sections, by his deputy or deputies.

"Section 4 of said act of June 6, 1900, provides that before accepting the jury, the court shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror or cause any vacancy in the jury, when empaneled, to be filled; and it appears in this case that notice was given to the counsel for the respondents, of the time and place when the said jury would appear for acceptance, and be sworn, and given directions when and how to proceed with their duties; and at that time a number of counsel were present, and had the opportunity, if they so desired, to object to any of the said jurors, or to question any of

the said jurors, as to their qualifications for service in this proceeding; and if said counsel chose to allow the said jurors then to be accepted and sworn, without raising any objections, because of the manner of their selection, or because of any technical reason, it seems to me that they waived such point, and they would be afterward estopped from raising the same; and especially after going before such jurors, and offering testimony on the merits of the proceeding. The notice which appears to have been given to the various attorneys for respondents contained the names of the jurors, and the fact that they were selected under the provisions of the act of June 6, 1900, and that the court would be requested to empanel and swear said jury at 10 o'clock a. m., on March 16, 1906.

"The counsel also object to the form of the oath that was administered to said jury, the record disclosing that they were sworn in accordance with the provisions of the said act of June 6, 1900. The court must presume that all the provisions of said act, so far as the oath was concerned, were complied with, in the absence of any definite contradiction of the record.

"It might also be said that the said order of March 16, 1906, accepting the said jury, and reciting that the said jurors were summoned by the marshal, would preclude the contention thereafter in this proceeding, and with no change of circumstances, that such was not the fact. Every presumption would be in favor of the verity of said order."

II.

The award of the first jury of grade damages to the remainder is not conclusive of the question of benefits to the remainder.

The third assignment relates to the plea of *res judicata*, set up by these appellants. At the first hearing of this case the court instructed the jury that they were at liberty to award as damages not only the value of the land taken for the extension of Eleventh street, but also damage to the remainder of the land, if the jury should find that said remainder might have been damaged by reason of being left high above the grade of the extended street (R., 2, 3), and the jury awarded in terms certain amounts to these appellants for grade damages. The point is therefore made that that award having been confirmed by the court and paid by the District of Columbia, constitutes an adjudication of the fact that the said remaining portions of land owned by these appellants were damaged, which adjudication precludes an assessment for benefits. This point, it is submitted, cannot be sustained. The former jury, in addition to the awards for land taken and grade damages to the remainder, assessed benefits against the remaining portions of such land in the sum of $36,000, indicating that their conception of their duties under the instruction of the court was to return by separate schedules the amount to be paid as damages and the amount to be assessed as benefits. This was the mode of procedure contemplated by the statute, which provides, section 7 (act of March 3, 1899):

> "That if the use of a part only of any piece or parcel of ground shall be damaged, the jury in determining its value shall not take into consideration any benefits that may accrue to the remainder thereof

> from the extension of said street or highway, but such benefits shall be considered in determining what assessment shall be made on or against such part or such piece or parcel of land as may not be taken, as hereinbefore provided."

It will be seen therefore that the return of the jury under the instruction of the court and the provision of the law just set forth can in no sense be considered as conclusive of the question of benefits to the remaining portion of appellant's land which were assessed by the second jury.

Furthermore, the judgment of the court confirming the verdict of the first jury as to the awards therein would not be conclusive upon the District of Columbia, for the reason that by the act of June 6, 1900, the Commissioners of the District of Columbia were *directed* to make application to the court for the confirmation of these awards, and for that reason the principles of *res judicata* would not apply. The owners, however, had their election in the premises. They were at liberty to file objections to the awards if they saw fit; not having done so and having accepted the payments, they are precluded from disputing the adequacy of said award before the second jury.

III.

Findings of fact of the jury will not be reviewed except on a showing of fraud, accident, or plain mistake.

The statute of June 6, 1900, under which the proceedings for a reassessment were had, in section 6 provides:

> "That the court shall have power to hear and determine any objections which may be filed to the said verdict or award and to set aside and vacate the same

in whole or in part when satisfied that it is unjust or unreasonable; and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury."

The setting aside of the verdict is manifestly, according to the terms of this provision, a matter which is addressed to the discretion of the court. In overruling the motion to vacate the verdict the court has said, in effect, that it is not satisfied that the said verdict is unjust or unreasonable. From this ruling of the court it is submitted no appeal can lie. It is in the same category with a motion for a new trial, and is governed by the same legal principles.

In Shoemaker *vs.* U. S. (147 U. S., 282), which was an appeal involving the condemnation of land necessary for Rock Creek Park, the court said:

> "If, as we have said, the court below was right in refusing to restrict the Commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.
>
> "The rule on this subject is so well settled that we shall content ourselves with repeating that quotation from Mills on Eminent Domain (246) made in the opinion of the court below: 'An appellate court

will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of the evidence. Hence for error in judgment of the commissioners in arriving at the amount of damages there can be no correction. The commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.' "

In Clapp *vs.* Macfarland (20 Appeals, 235), which was an appeal growing out of the extension of Sixteenth street, undertaken under the provisions of the identical act of Congress (June 6, 1900) under discussion here, the court said (page 229):

"If a statement of the testimony, which was taken before the jury, or any part of it, was necessary for a hearing before the court on the exceptions or objections, it could have been, and in fact to some extent it was, set forth in affidavits filed in the cause on both sides. It is not denied that these affidavits were considered by the court. They were not, it is true, allowed to prevail; but that is what may happen in any motion for a new trial.

"We must conclude in this point that the appellants had all the hearing in the court below to which they were entitled by the statute; and that the statute is not objectionable for refusal to authorize and allow such hearing.

"We have not here the means of determining whether the court below was right or wrong in its

determination of the exceptions interposed by the appellants. While it may be assumed that, in cases like the present, the right of appeal is given by the statute which established this court, and it is inferred from the 13th section of the statute under consideration that it was contemplated by it that the right might be exercised, yet it is impossible for this court to review the rulings of the court below upon matters of fact where the facts upon which those rulings are based are not brought before us by the bill of exceptions or in some other authorized way. We have here no bill of exceptions; we have not the facts in any way on which the jury acted. And yet we are asked here substantially to put ourselves in the place of the court below, and to grant what is virtually no more than a motion for a new trial, which that court has refused to grant. A motion for a new trial is usually in the discretion of the trial court, and ordinarily is not the subject of review in an appellate tribunal.

"It is true that there are some things in the record before us which may be supposed to have a tendency to show that the jury was misled, or improperly influenced by an apparent threat of counsel for the Commissioners, into the adoption of an erroneous standard of assessment; and that arbitrarily and without justification they assumed to assess one-half of the award of damages as benefits against the adjacent property. But they were allowed by statute to assess that amount; and inasmuch as in other cases, where the acts of Congress themselves have arbitrarily undertaken to direct the assessment of such one-half, such acts have been sustained by the Supreme Court of the United States as violating no right, we cannot assume to say that the jury adopted

an illegal and erroneous standard in this case. It is a question of fact, upon which we cannot pass, and not a question of law, that, in the absence of the threat to which reference has been made, the jury might have adopted some different standard."

In the case of D. C. *vs.* Cemetery (5 Appeals, 499) the court said:

"In the second place, with respect to the main appeal of the District of Columbia, that from the order of confirmation of the report of the commissioners of appraisement, no question is raised as to the right of appeal, notwithstanding the peculiar character of the proceedings; and we may assume that, in connection with the equity suit, instituted by the heirs of David Moore, and into which all the other proceedings have been incorporated, the appeal may be sustained. But then, so far as concerns this appeal by the District, we fail to find anything on which to review the decision of the court below. The burden of complaint is that the valuation of the land was excessive. But we have not the means of correcting that, even if we had the authority to do so. There is nothing whatever in the record, except two *ex parte* affidavits, which, of course, we cannot regard, to show excessive valuation, or to show the grounds upon which the valuation was based. We cannot review, much less reverse, upon such a record as this. To the commissioners and not to the court, it must be remembered, the law has committed the matter of the determination of value. Their report is the equivalent to the verdict of a jury; and the court should only interfere with the one as under the general rules of law, it would interfere with the other."

IV.

The refusal of the court to hear all the evidence.

The evidence was heard by the jury without the presence of the court, by direction of the court under the authority of section 4 of the act of June 6, 1900, which left that matter optional with the court. This testimony was presented to the court *in extenso*, and filed in the form of an affidavit by the stenographer, in support of the exceptions to the verdict.

The bill of exceptions certified that (R., 112):

> "After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellants in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence or hearing it fully read the court passed an order overruling all the exceptions and confirming said verdict and refused to consider said testimony any further, and the appellant excepted."

It was not incumbent upon the court to hear all the testimony which had been presented to the jury. It is not an uncommon practice in courts of equity, where questions of law and fact are left entirely to the court, to consider the testimony in a condensed form. The court evidently heard sufficient testimony to be satisfied that there was sufficient evidence therein to support the findings of the jury.

That the court in first instance gave ample hearing and

consideration to the many exceptions filed to the verdict, is evidenced by the elaborate opinion filed in the case from which we again quote (R., 47):

> "Other exceptions by various owners of property are filed, all of which I may perhaps dispose of generally, without making special remarks relating to each individual case. In brief, the objections are, that the jury assessed benefits caused by the extension of the railroad and the building of houses and other improvements in the neighborhood, and that they did not and could not have confined their assessment of benefits to the actual increase in value of the lands occasioned by the extension of Eleventh street only; and that for that reason the whole assessment should be set aside.
>
> "There are some difficulties, to be sure, in getting at exact justice in any case of this kind. The jury were fairly instructed what their duty was, and they honestly, in my judgment, endeavored to perform that duty. Being relieved from the necessity of confining the assessment area to the 200-feet strip on each side of the street, they have in some instances gone beyond that, and they have also been relieved of the necessity of assessing any special amount, and have been told to assess benefits only where benefits existed, and to the extent of their existence caused by the extension of the street. The fact that they had to look backward instead of looking forward to judge these benefits may not have been more difficult than in the ordinary case to assess benefits before they have actually accrued to the lands, because in either case there must be some latitude given for the exercise of judgment.
>
> "Again it is claimed that the subdivisions made since the street was extended have affected the assessments

wrongfully, because there have been combinations by which owners of lots have subdivided land and made the lots now front on Eleventh street which before were not fronting on Eleventh street, and that no benefits should be assessed to those lands because of the purchase and subdivision since the street was extended. It may be true, and it therefore is presumed, that such is the case, but I am unable to see that the combination or subdivision of the lands made since prevents the jury from saying that the lands themselves were benefited by the extension of the street, even if no such changes had been made. If the subdivision or combination had not been made, the jury could possibly still have assessed the ground on the supposition that it would be made, because such subdivision or combination would be the most advantageous use that could be made of the property, and it might be presumed that the interest of the owners of the various properties benefited would induce them to make such use of it.

"At any rate, I am unwilling to disturb this verdict, by reason of any claims made by individual owners as to the amount of the assessment, because while it may be true that exact justice would require a few dollars more or less to be taken off of some lots, and a few dollars more or less to be added to other lots, still it is the office of the jury to fix that amount, and unless that duty has been performed in such a way as to convince the court that the assessment is unreasonable and unjust, the court would not undertake to disturb the verdict and require a new jury to make a reassessment.

"If a new jury was empaneled at this time, it would still be further from the date of the extension of the street, and the new jury would be perhaps more em-

barrassed than the present jury has been in ascertaining the exact amount of benefit to the neighboring lands, caused by the extension of the street."

The Assessments Were Just and Reasonable.

The testimony which appears in this record does not come under the certificate of the trial judge in the usual form that it is the substance of all the evidence in the case. The bill of exceptions (R., 55) states:

> "The following, purporting to be the substance of the evidence before the jury, which evidence was presented in court in the form of an affidavit by the stenographer after the verdict was returned and exceptions being heard."

And in the concluding certificate the court states:

> "The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court."

The testimony, therefore, which appears in this record is the abstract of the plaintiffs in error. Counsel for the defendant in error contended below, and contend here, that as the bill of exceptions does not purport to contain the substance of the evidence, the court will decline to consider it. Apprehensive, however, that the court below might possibly adopt a different view, counsel for the District of Columbia suggested a diminution of the record in the Court of Appeals of the District of Columbia for the purpose of bringing before that court a more complete record of the testimony taken before the jury. The petition for certiorari was opposed by counsel for plaintiff in error (R., 117).

The Court of Appeals, however, denied the writ of certiorari on that suggestion, for the reason that the testimony should appear, if at all, in the bill of exceptions, and the appellant, not having brought up the complete record of the testimony, the court would decline to consider any of it.

Ample justification for the assessments returned can be found even in the *ex parte* abstract of the testimony contained in the record.

Testimony of Harold E. Doyle (R., 55, 56), W. A. J. Hopkins (R., 58), William Simms (R., 59), Thos. W. Smith (R., 61), P. J. Walshe (R., 62), Fulton R. Gordon (R., 63), Allan W. Mallory (R., 65), W. B. Turpin (R., 67), C. S. Bundy, J. P. (R., 89).

The verdict contains the following statement of the jury (R., 15).

> "That after being duly sworn by the court for the performance of our duties we personally viewed and examined the land in the neighborhood of the said extension with great care, and thereafter in the United States court-house, in the city of Washington, in said District, on the 28th day of March, 1905, at 2 o'clock p. m., and from time to time thereafter pursuant to adjournment, after due notice to the persons interested therein, we met and heard and received such evidence as was offered or submitted to us on behalf of the District of Columbia and by the persons interested, touching the benefits which have accrued to property by reason of the extension of said Eleventh street as aforesaid, and upon our personal view and examination aforesaid, and the evidence aforesaid, we find that the lots, pieces and parcels of land which have been benefited by the aforesaid extension of Eleventh street are the lots, pieces or parcels of land mentioned, set forth and described in the following schedule; and we, the jury aforesaid, find

that the several lots, pieces and parcels of land mentioned and set forth in said schedule have been benefited to the extent of the respective amounts mentioned and set forth in said schedule, and we hereby assess against said lots, pieces and parcels of land, respectively, as and for benefits, as aforesaid, the several amounts mentioned, specified and set forth in said schedule."

This declaration is not negatived by any showing in the record.

The Cost of Grading Blocks 27 and 28.

The first jury, in addition to the award for the land of the plaintiffs in error, awarded grade damages in the sum of $16,569.00 (R., 4). An instruction authorizing such an award was granted by Judge Hagner (R., 2, 3), to which instructions the Commissioners of the District of Columbia excepted.

No objection was made to this award by the plaintiffs in error. The money was paid to and accepted by their predecessors in the title on August 16th, 1900 (R., 105, top of page). The award of the first jury, its payment and acceptance without protest is, it is submitted, conclusive upon this proposition.

Considerable stress is laid by counsel for the plaintiff in error upon the testimony of D. J. Howell, a civil engineer who was in charge of the work of grading the remainder of blocks 27 and 28, owned by the Columbia Heights Realty Company, his estimate being that the total cost of such grading would be in the neighborhood of $56,000.00, the argument being that the benefits assessed were excessive in view of the alleged cost of adjusting the property to the grade of Eleventh street. It is argued that the entire cost of this

grading was made necessary by the extension of Eleventh street, but this assumption, it is submitted, is altogether without warrant. The situation of this property was such that a large expenditure would have been necessary for grading in order to put it on the market in any event. Witness Thomas W. Smith (R., 61) testified on this proposition as follows:

> "I think the cutting down and opening of the street was the proper way to develop block 28. The people who owned the property ought to have a fair knowledge that they would be in the air and would have to dig their land down when that street was opened up to the public use. * * * Any person buying that property, referring to block 28, seeing its height above grade, knew positively that Eleventh street had to be extended, and bought it with that incubus on it which practically would be a mortgage on it of the cost of reducing that land to the level where houses could be built, and knew he was buying land which was reduced in value that much."

The extension of Eleventh street was but one of the incidents necessary to the subdivision of this property. Florida avenue, a street with an established grade, bounded the property on the south. In order to make the property available with reference to Florida avenue frontage, grading would have to be done. To make the property available with reference to Roanoke frontage, grading would have to be done. As shown on the plat offered in evidence by the plaintiff in error, page 110, showing a proposed subdivision, new streets were to be cut through, etc. All of this grading to a distance of three hundred feet back from Eleventh street, on the theory of the plaintiffs in error, is chargeable to the extension of that street. It is submitted that only such grading as was necessary to adjust that property to its

Eleventh street frontage should have been considered, which would be to a depth of about 100 feet on that street. Moreover, the $16,000 awarded by the first jury was paid to and accepted by the plaintiffs in error in August, 1900. It is in evidence that Eleventh street was cut through at a cost for excavation of 28 cents per cubic yard, whereas the cost of excavating the remainder of blocks 27 and 28 at the time the excavating was done (1908) was 48 cents per cubic yard. The most important element in the cost of excavation is the distance of the haul, and if these appellants had used the money awarded to them for that purpose at the time Eleventh street was opened the necessary excavation could have been done for the amount awarded.

Again, counsel for the plaintiffs in error in their brief estimate the cost of grading block 28 at 65 cents per cubic yard. Their testimony is that they were having the entire work done at 48 cents per cubic yard. An opinion by their witness, Mr. Howell, to the effect that the grading on block 28 was more expensive than that on block 27 is their basis for the altogether unwarranted assumption that the grading on block 28 was costing 65 cents per cubic yard. In fact, according to their own testimony they were paying 48 cents per cubic yard for all of it.

The owners of the property received an award of $46,000 as damages. In the ordinary course of real estate operations, parties subdividing land dedicate the streets and do the necessary grading to make the land marketable at their own expense. In this case the owners are $46,000 better off, less the assessment levied against them, than would be the case in an ordinary real estate operation of this character.

Respectfully submitted.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.

COLUMBIA HEIGHTS REALTY CO. v. RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.[1]

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 157. Argued April 12, 13, 1910.—Decided May 16, 1910.

Under the act of February 9, 1893, c. 74, § 8, 27 Stat. 436, appeals from and writs of error to the Court of Appeals of the District of Columbia are governed by § 705, Rev. Stat., as to procedure, and by §§ 997 and 1012, Rev. Stat., as to filing the transcript and assignment of error as from a Circuit Court.

Rule 35 refers in terms only to writs of error and appeals under § 5 of the Court of Appeals Act of March 3, 1891, but by Rule 21, it is in effect extended to every writ of error and appeal; and, although errors may not be assigned on a writ of error to the Court of Appeals of the District of Columbia, the court is not under obligation to dismiss the writ in case the assignment of errors is not filed as required by §§ 997 and 1012, Rev. Stat., having by its rules reserved the option to notice plain error whether assigned or not.

In this case the court exercises the option reserved under Rules 35 and 21 to examine the record to ascertain if there are errors not assigned as required by §§ 997, 1012, Rev. Stat., but so plain as to demand correction.

Under the complete jurisdiction which the United States exercises over the District of Columbia it is within the power of Congress to arbitrarily fix a minimum amount to be assessed for benefits on property within the assessment district of a street opening proceeding, and so held as to act of June 6, 1900, c. 810, 31 Stat. 668, as to the opening of extension of Eleventh Street.

Where Congress passes an act superseding a former act in regard to condemnation proceedings and providing for a reassessment of benefits, the reassessment is a continuance of the proceeding under the former act and not a new proceeding; and the assessment for

[1] Original Docket Title: Columbia Heights Realty Company v. Henry B. F. Macfarland and others, Commissioners of the District of Columbia.

benefits is not barred by the statute of limitations if the proceeding was commenced in time under the original act.

Objections to qualifications of jurors and their examination and oath in condemnation proceedings must be taken at the time.

That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury if the statute does not so provide.

On condemnation proceedings where the statute directs the court to follow the procedure prescribed for other proceedings, the court will properly vary the oath so as to relate to the property involved, and not to the property in the other proceedings; and if the bill of exceptions does not show that the essential matters were omitted from the oath, the presumption is that the statutory oath was complied with as far as applicable to the proceeding in which it was administered.

Where a verdict of damages and benefits is set aside as to benefits and a reassessment ordered, the remainder of the verdict as to damages alone does not stand as *res judicata* that the property is damaged and there are no benefits that can be assessed under a subsequent act as to procedure for reassessment of benefits.

Where doubt as to meaning of one part of the charge is eliminated by other parts of the charge, there is no reversible error.

Where the jury in a condemnation proceeding exercises its own judgment derived from personal knowledge from viewing the premises and from expert opinion evidence not taken in presence of the court, the power of the court to review the award is limited to plain errors of law, misconduct or grave error of fact indicating partiality or corruption, and the court is not required to review all the evidence taken before the jury in order to determine whether the award is unreasonable or unjust where no specific wrong or injustice is pointed out.

Where the evidence in a condemnation proceeding is not before this court and there is no agreed statement of facts this court cannot determine that the trial court erred in holding the award of the jury made on viewing the premises and expert evidence not so unreasonable or unjust as to require a new trial before another jury.

31 App. D. C. 112, affirmed.

THE facts are stated in the opinion.

Mr. Leo Simmons and *Mr. Arthur A. Birney* for plaintiff in error.

Mr. James Francis Smith, with whom *Mr. Edward H. Thomas* was on the brief, for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

In 1899, the then Commissioners for the District of Columbia filed a petition in the Supreme Court of the District for the condemnation of land necessary for the extension of Eleventh street northwest. In due course the statutory jury of seven filed an award of damages and of benefits. The verdict was confirmed so far as it awarded damages for the property, but was disaffirmed and vacated as to the amount of benefits. The award so far as it assessed the damages was accepted and the money has long since been paid; but from the order setting aside or vacating the assessment of benefits the Commissioners appealed to the Court of Appeals of the District, where that order was reversed and the proceeding remanded to the lower court with direction to vacate the order setting aside the amount of benefits, "and for such further proceedings in the case according to law as may be just and right." The Supreme Court of the District on March 4, 1904, in obedience to the mandate of the Court of Appeals, set aside its former order vacating the assessment of benefits by the jury, and thereupon heard the matter upon exceptions of the defendants to the award, and upon the motion of the petitioners for a confirmation of the award of benefits. Whereupon an order was made denying confirmation, and ordering that "in case the petitioners desire to proceed further in the premises, they shall within a reasonable time make application to this court for directions to the marshal to summon a jury of twelve, as provided by law." From this order refusing confirmation the petitioners prayed an appeal, but did not perfect same. The next step in the case was taken on June 17, 1904, when the land owners moved the court

to dismiss the proceeding, assigning as reason therefor that "the law under which such proceeding must be had has been repealed," and, second, "for failure of petitioners to proceed as required by the order of this court of March 4, 1904." Upon this motion the court, on June 17, 1904, made an order in these words:

"Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904, it is by the court, this 17th day of June, A. D. 1904, ordered: That the petitioners in the above-entitled cause, within sixty days from the date hereof proceed in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the act of Congress approved June 6, 1900, entitled 'An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes.'"

Thereupon the then Commissioners, in continuance of the old proceeding under the act of March 3, 1899, c. 430, 30 Stat. at Large, page 1343, filed an amended and supplementary proceeding according to the terms of the later act of June 6, 1900, c. 810, 31 Stat. at Large, page 668, in which, after setting out all of the proceedings under the pending petition, they prayed for a reassessment of benefits against abutting and adjacent owners whose lands had not been assessed for benefits as required both under the former and latter acts of Congress in respect to the extension of Eleventh street northwest. Under this amended petition a jury of seven was impaneled, who returned an assessment of benefits against the plaintiffs. This, after exceptions had been overruled, was confirmed. A writ of error was taken by the plaintiffs in error to the Court of Appeals for the District of Columbia, where the judgment of the Supreme Court was affirmed. Thereupon this writ of error was sued out.

This protracted litigation is now before us, unaccompanied by an assignment of errors.

The act of February 9, 1893, ch. 74, § 8, 27 Stat. at Large, 436, concerning writs of error and appeals from the Court of Appeals of the District of Columbia, provides that they shall be allowed in the "same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia." The procedure referred to is that found in § 705, Rev. Stat., which provides that such writs or appeals shall be allowed in the "same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a Circuit Court."

Sections 997 and 1012, Rev. Stat., require the transcript from the Circuit Court to be filed with an assignment of errors, and the thirty-fifth rule of this court prescribes the character of such assignments, and "that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed, . . ." and that "errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." This rule refers in terms only to writs of error and appeals under § 5 of the act of March 3, 1891, but it is, in effect, extended to every writ of error or appeal to or from any court by rule 21, which requires that the brief shall set out "a specification of the errors involved." This "specification of error" must conform to rule 35 in particularity. Thus the fourth paragraph of rule 21 provides: "When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."

The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or ap-

peal because of the non-assignment of errors as required §§ 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error whether assigned or not. *Ackley School District* v. *Hall*, 106 U. S. 428; *Farrar* v. *Churchill*, 135 U. S. 609, 614; *United States* v. *Pena*, 175 U. S. 500, 502.

In the present case the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objection for failure to assign error under §§ 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any "plain error" which obviously demands correction.

1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not. Under the proceedings had theretofore under the act of March 3, 1899, c. 431, 30 Stat. 1344, there had resulted a condemnation of the land needed for the extension of Eleventh street northwest, and an assessment of damages sustained by the land owners, which award had been confirmed and the money paid. But that act provided "that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided." Objection to this arbitrary fixing of the minimum amount to be assessed for benefits upon lots benefited by the opening of the street was considered, and the act sustained as within the complete jurisdiction which

the United States possesses over the District of Columbia, in the case of *Wight* v. *Davidson*, 181 U. S. 371. The benefits assessable under that act were separately found as against each parcel of property supposed to be benefited, but that part of the award of the jury was vacated upon the erroneous supposition that the rule for assessment of benefits in the act was void. This action of the District Court, as we have already seen, was reversed. Thereupon the District Court denied the motion of the Commissioners to affirm the verdict of the jury assessing benefits. In this situation it was open to the Commissioners to apply for another jury. Before they did so the special act of June 6, 1900, was passed. The effect of the action of the court in refusing to confirm the first assessment of benefits was to make void the award and verdict of the jury, in so far as that verdict had separately found the benefits accruing to the property by the extension of the street. The Commissioners were therefore complying with the direction to them found in the twelfth section of the act of Congress of June 6, 1900. That act provided that the Commissioners should make application to the Supreme Court of the District of Columbia "for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street," etc. And "in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners . . . are authorized and directed to make application to said court for a reassessment for such benefits under and in accordance with the provisions of this act." The procedure under this act differs in many particulars from that under the act of 1899. In view of this the property owners, on June 17, 1904, moved the court to dismiss the old proceeding, basing the motion, as shown by the entry upon the journal of the court upon the contention that

"the law under which such proceeding must be had has been repealed," and, "for failure of the petitioners to proceed as required by the order of this court," of March 4, 1904. Thereupon the court made the order heretofore set out, requiring a reassessment of benefits under the later act.

There is no possible doubt as to the correctness of this order. The new act superseded the former act in so far as the reassessment of benefits was concerned. Both parties seemingly concurred in assuming that this was the case, and that the refusal of the court to confirm the original assessment of benefits was an annulment of the award of benefits by the first jury. The order was in part based upon the motion of the plaintiffs in error, and was made without protest or objection, and none was suggested for more than a year. Such a reassessment was but a continuance of the original proceeding, which might well be done by an amended or supplementary petition by virtue of the authority of the new act. This disposes also of the contention that the proceeding for reassessment of benefits was barred by the statute of limitations of three years. The proceeding for reassessment was not a new action, but a continuance of the old one, and therefore not subject to the operation of the statute.

2. Coming now to the errors assigned upon the procedure under this petition for a reassessment of benefits. The first objection is that the court did not examine the jurors as to whether they possessed the qualifications required by § 4 of the new act, nor administer to them the oath required by the statute under which the court was proceeding.

These objections come too late. The statute made it the duty of the court to hear objections to jurors "before accepting them." None was made. So with the oath; if that administered departed in any particular from

the terms of the statute, objection should have been made at the time. None was made, and only after the verdict was any made. The journal entry, moreover, recites that the jurors summoned by the marshal, under the order theretofore made, were "accepted as qualified," and that the oath was administered to them "in accordance with the provisions of the act of Congress of June 6, 1900." It is now sought to contradict the record by a statement contained in a bill of exceptions allowed after final judgment, that counsel for the plaintiff in error was not present when the order of record was made and the jury accepted and sworn, and that after they had been so accepted and sworn, counsel was denied the right to examine the jurors as to their qualifications. In respect to the oath administered the bill of exceptions contains the meagre statement that the jurors were sworn to "assess the benefits accruing to the property, abutting or adjacent to Eleventh street extended, according to the statute."

The oath which is required to be administered by § 4 of the act of June 6, 1900, under which the court was proceeding, was an oath applicable only to the condemnation of land for an extension of the Columbia road, and the jury were to be sworn to *assess the damages and benefits resulting from the extension of that road.* Such an oath in the present case, when only benefits were to be assessed for property already taken and paid for, *upon another street altogether*, was of course not applicable. The court, in such circumstances, required as it was to follow the procedure of the Columbia road statute, was perfectly justified in swearing the jury to assess benefits to the property concerned in this proceeding. True, the oath prescribed by § 4 includes an affirmation that the jury was disinterested and unrelated and would act without favor or partiality, but the statement in the bill of exceptions does not show that these matters were omitted from the oath, and the presumption remains that the

statutory oath was followed as far as applicable, which is the implication from the journal entry.

As to the qualifications of the jurors: Primarily, they had been summoned, as shown by the order to the marshal and his return, as men having the statutory qualifications. The journal recites that the court "accepted them as qualified." No hint is found in this transcript that they were not qualified, or that they were guilty of any misconduct. Not having asked the court to examine them before accepting them, or to be then permitted to qualify them, it was not reversible error to deny the privilege after they had been sworn and accepted. That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury. Under the statute and the warning order, the parties interested were required to be present and "continue in attendance" until the matter was ended.

3. It is assigned as error that the court erred in overruling the plea of *res judicata* as to lots 1 and 30 in block 27, and lots 1 to 16 in block 28. The plea was not good.

The first jury, that which under the act of March, 1899, assessed both damages and benefits, was, under that act, required to award damages not only for land taken for the extension of the street, but also damages to the remainder of the land by being left high above or below the grade. The then owners of these lots were awarded such grade damages to land not taken, which award has been confirmed and paid. But the same jury, as they were instructed to do, assessed the benefits sustained to the remainder, not taken, separately. This part of the verdict was set aside; so that, as it stands, the plaintiffs have been paid the damages sustained to the property not taken by reason of the grade resulting, but have never been assessed for the benefits accruing to the same untaken remainder. It is now said that the confirmation of the amount of damages is an adjudication

that the lots not taken were damaged and not benefited. But that is not the legal construction of the judgment, for the real damages have never been reduced by the benefits which the statute says shall not be less than fifty per cent of the damages sustained. The former judgment was conclusive only as to the damages, and that has not and could not be reopened. The benefits having been separately stated in that verdict remained to be determined and were properly reassessed under the later act of Congress.

4. Alleged error in instructions given or refused.

The sixth assignment noticed in the brief is error in giving the first instruction asked by the Commissioners. This request was in these words:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from said extension of said Eleventh street. By extension of the street the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare, or highway."

The objection to this seems to be that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street. But this was not the whole of the instruction of the court upon that subject, and any doubt as to what the court did mean was eliminated by other parts of the charge. Thus the court said that to lay an

assessment for benefits against any piece of land abutting upon said street or adjacent thereto the jury must find that the benefits upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by the extension of car lines in said street. Again, the court said that such benefits must accrue "immediately from the extension of the street in question." This was repeated, when it was said that "the benefit assessable must be an enhancement in value immediately upon the opening and extension of said street," and that they had "no right to consider any enhancement or increase in value that is the result of any special improvements made on the street after it was opened and established as previously stated." There is no reason for doubting the meaning of the court.

The several requests made by the plaintiffs in error were sufficiently covered by the charge as given.

5. The next specification of error in the brief is in these words: "The court erred in refusing to review the evidence taken before the jury and to determine if the verdict was unjust and unreasonable." The act of June 6, 1900, under which the court was proceeding, required the jury to go upon and view the premises, and then to hear and receive such evidence as might be offered, in the presence of the court, or otherwise, as the court might direct, and to then return the majority verdict as to the amount of benefits against the property involved. In this case the evidence was not heard by the jury in the presence of the court, that being according to the order of the court.

The act further provides that "the court shall have power to hear and determine any objection which may be filed to said verdict or award and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury

shall be summoned, who shall proceed to assess the damages and the benefits as the case may be," etc.

This specification of error has for its foundation the concluding paragraph of the bill of exceptions, as follows:

"The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court. After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellant, in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of the law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence, or hearing it fully read, the court passed an order overruling all the exceptions, and confirming said verdict, and refused to consider said testimony any further, and the appellant excepted.

"And thereupon the appellant presented to the court, the justice who presided at the hearing in this case and made the rulings herein referred to, this its bill of exceptions containing the proceedings before the court and before the jury or commission with the substance of the evidence taken before the said jury, and the affidavits filed in the case subsequent thereto, as herein referred to, with the exceptions as therein noted, which were duly taken by the appellants separately, in the order in which they appear, and allowed by the court at the time."

The certificate was in these words:

"And the said appellant by its counsel prays the court to sign and seal this its bill of exceptions and make the same a part of the record in this case, which is now accordingly done, and the said bill of exceptions is here

now signed and sealed in due form and made a part of the record in this case this 14th day of August, 1907, *nunc pro tunc.*"

Why the court should be required to read, or hear read, "in full," a paper which was confessedly but the substance of the testimony taken before the jury, as "abstracted by appellants from the testimony filed as an affidavit in the case," we are at a loss to know. The power of the court to review the award by such a jury must in the very nature of the matter be limited to plain errors of law, misconduct or grave error of fact indicating plain partiality or corruption. The jury saw and heard the witnesses; the court did not. The jury went upon and viewed the premises; the court did not. The duty to review did not involve mere error in judgment as to the extent of enhancement in value, for the judgment of the jury manifestly rested upon much which could not be brought before the court. The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them. *Shoemaker* v. *United States*, 147 U. S. 282. No specific wrong, injustice or error is pointed out. Even if we had all of the evidence before us, it would not be within our province to weigh it. But we have not, nor is there any agreed statement of facts. It is impossible for us to say, therefore, whether the trial court erred in holding the award not unreasonable, or so unjust as to require a new trial before another jury. Other matters complained of in argument need not be specifically referred to.

We find no error and the judgment is

Affirmed.